EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

o. 86-30-CSY
tatus: GRANTED

Title: New York, Petitioner
v.
Joseph Burger

ocketed:
uly 18, 1986

Court: Court of Appeals of New York

Counsel for petitioner: Underwood, Barbara D.

Counsel for respondent: Mahler, Stephen R.

ntry	Date	Note	Proceedings and Orders
1	Jun 16 1986		Application for extension of time to file petition and order granting same until July 18, 1986 (Marshall, June 19, 1986).
2	Jul 18 1986	G	Petition for writ of certiorari filed.
3	Aug 11 1986		Brief of respondent Joseph Burger in opposition filed.
5	Aug 13 1986		DISTRIBUTED. September 29, 1986
6	Oct 6 1986		Petition GRANTED. Justice Scalia OUT.
			**********
9	Nov 7 1986		Order extending time to file brief of petitioner on the merits until December 6, 1986.
9	Dec 6 1986		Brief of petitioner New York filed.
11	Dec 19 1986		Order extending time to file brief of respondent on the merits until January 21, 1987.
12	Dec 19 1986		SET FOR ARGUMENT. Monday, February 23, 1987. (3rd case).
13	Dec 29 1986		Record filed.
14	Jan 14 1987		Brief of respondent Joseph Burger filed.
15	Jan 22 1987		CIRCULATED.
16	Jan 21 1987	X	Brief amicus curiae of ACLU, et al. filed.
17	Feb 14 1987	X	Reply brief of petitioner New York filed.
18	Feb 23 1987		ARGUED.

86-80

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

**Counsel of Record for the Petitioner*

July 18, 1986

QUESTION PRESENTED

Whether the fourth amendment of the United States Constitution disables the State from conducting an otherwise valid warrantless administrative inspection of commercial premises in a pervasively regulated industry, pursuant to section 415-a of the New York Vehicle and Traffic Law and section 436 of the New York City Charter, merely because the violations that the inspection seeks to uncover for administrative purposes also constitute evidence of crimes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

—against—

JOSEPH BURGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The State of New York requests that this Court issue a writ of certiorari to review the judgment of the New York Court of Appeals that granted Joseph Burger's motion to suppress physical evidence, vacated his guilty plea, dismissed the counts of Kings County Indictment Number 6972/82 charging criminal possession of stolen property, and remitted the case to the New York Supreme Court, Kings County for further proceedings. That judgment reversed an order of the Appellate Division of the Supreme Court, Second Judicial Department, which had affirmed Burger's judgment of conviction.

Opinions Below

The opinion of the New York Court of Appeals is reported at 67 N.Y.2d 338, ____ N.Y.S.2d ____ (1986). The opinion of the Appellate Division is reported at 112 A.D.2d 1046, 493 N.Y.S.2d 34 (2d Dep't 1985). The opinion of the trial court

following reargument is reported at 125 Misc.2d 709, 479 N.Y.S.2d 936 (Sup. Ct. Kings County 1984). The original opinion of the trial court is not reported. Each of these opinions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the New York Court of Appeals was rendered on May 8, 1986. This petition for certiorari was filed within the time specified by the order dated June 18, 1986 of the Honorable Thurgood Marshall, Associate Justice of this Court, which extended the time for filing the petition to and including July 18, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved
(reproduced at pp. 22a-24a of the Appendix to this petition)

1. United States Constitution, Fourth Amendment

2. New York Vehicle and Traffic Law § 415-a

3. New York City Charter § 436

STATEMENT OF THE CASE

Introduction

The defendant, Joseph Burger, was convicted upon a plea of guilty of possessing stolen property on November 17, 1982, at an automobile junkyard that he owned in Brooklyn. At about 12:00 noon on that date, five plainclothes New York City police officers assigned to the Auto Crimes Division conducted a routine warrantless administrative inspection of the junkyard. During this inspection, the officers discovered and seized several items of property that had been reported stolen: one automobile, parts of another, a wheelchair, and a walker. The

defendant was arrested during the inspection, and was indicted on multiple counts of criminal possession of stolen property (N.Y. Penal Law §§ 165.40, 165.45[1], [3]) as well as one count of unregistered operation as a vehicle dismantler (N.Y. Veh. & Traf. Law § 415-a[1]).

The Motion to Suppress Physical Evidence

The defendant moved to suppress the physical evidence recovered from the defendant's junkyard during the inspection, on the ground that section 415-a(5) of the New York Vehicle and Traffic Law, which authorized the inspection, violates the fourth amendment of the United States Constitution. The Supreme Court, Kings County conducted a hearing on the defendant's motion. One of the police officers who carried out the inspection, John Vega, was the only witness called by the State at the hearing. The defendant testified on his own behalf and called no other witnesses.

The hearing testimony showed that the defendant's junkyard was open for business when the officers arrrived to conduct the inspection at 12:00 noon on November 17, 1982. As the officers approached the yard, Officer Vega saw, through the open chain link gate, two workers using a torch to dismantle a truck. The yard contained numerous vehicles and parts of vehicles, and there were no buildings in the yard.

The officers entered the yard and approached the defendant at the front gate. In response to Officer Vega's inquiries, the defendant identified himself as the owner of the yard and stated that he did not have a license to dismantle vehicles. In answer to a question by Vega, the defendant further stated that he did not have a "police book."[1] Vega told the defendant that

---

1 A "police book" is the record of vehicles and parts that a vehicle dismantler is required to maintain pursuant to N.Y. Veh. & Traf. Law § 415-a(5)(a). *People v. Burger*, 67 N.Y.2d at 340 n.1, Appendix at 3a n.1.

the officers were going to conduct an inspection pursuant to section 415-a of the Vehicle and Traffic Law.[2]

The officers proceeded to record the vehicle identification numbers of about five vehicles and parts of vehicles. One of the officers copied the serial number from a wheelchair that was leaning against a dumpster in the center of the yard, and also observed a handicapped person's walker on top of the dumpster. After calling in the vehicle identification numbers and the serial number by radio and by public telephone, the police learned that two of the automobiles had been reported stolen, and that a wheelchair and a walker had been in one of them. The police arrested the defendant and seized the property. Officer Vega estimated that the inspection was completed about one-half hour after the police had arrived.

After the suppression hearing, the court rejected the defendant's claim that N.Y. Veh. & Traf. Law § 415-a(5) violates the fourth amendment. In a decision dated April 12, 1984, the court therefore denied the motion to suppress the physical evidence seized from the defendant's junkyard. The hearing court concluded that the automobile junkyard industry was "pervasively regulated" within the meaning of this Court's decisions in *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and was therefore a proper subject for a warrantless administrative inspection scheme. The hearing court concluded, in addition, that section 415-a(5) properly limited the time, place, and scope of the searches it authorized, and thus satisfied constitutional requirements. Appendix at 18a-19a.

The hearing court granted reargument of the defendant's motion in light of the subsequent decision of the Appellate

2 Vega testified that the function of the Auto Crimes Division was to conduct daily inspections of vehicle dismantlers' yards. The officers typically conducted about five to ten inspections per day. Moreover, the standard procedure of the Auto Crimes Division allowed the police to proceed with an inspection even when the dismantler failed to produce a police book.

Division in *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 684, 491 N.Y.S.2d 618, 481 N.E.2d 250 (1985). *Pace* concerned an analogous local ordinance, New York City Charter § 436, which authorizes warrantless inspections of junkyards and other businesses dealing in secondhand merchandise. In *Pace* the court suppressed evidence obtained as a result of such a search, rejecting the claim that the search was authorized by section 436. The court reached that result not by holding section 436 unconstitutional, but rather by holding that the search at issue was not in fact authorized by section 436 because it was prompted solely by advance suspicion of criminal activity and therefore was not undertaken for adminstrative purposes.

On reargument in this case, the defendant urged the court to apply the *Pace* analysis, but the court distinguished *Pace* on its facts. The hearing court specifically found that in this case, unlike in *Pace*, "when the officers arrived at the defendant's yard, they had no reason to believe that the defendant may be dealing in stolen goods," 125 Misc.2d at 714, 479 N.Y.S.2d at 940, Appendix at 16a, and therefore the inspection of the defendant's yard was conducted for administrative purposes. Thus, the inspection in this case was authorized by New York City Charter § 436 as well as by N.Y. Veh. & Traf. Law § 415-a(5). In a decision dated June 11, 1984, the hearing court accordingly adhered to its previous determination and denied the defendant's motion to suppress the property seized as a result of the inspection. 125 Misc.2d 709, 479 N.Y.S.2d 936, Appendix at 11a-17a.

The Guilty Plea and the Sentence

On June 27, 1984, the defendant pled guilty to criminal possession of stolen property in the second degree (N.Y. Penal Law § 165.45[3]). The defendant entered the plea in full satisfaction of the charges contained in Kings County Indictment Number 6972/82 as well as the charges contained in a second indictment.

On August 15, 1984, the court sentenced the defendant as a second felony offender to a term of imprisonment of one and one-half to three years.[3]

The Appeals

The Appellate Division, Second Judicial Department affirmed the judgment of conviction in an opinion dated August 19, 1985.[4] The Appellate Division, which has factfinding power, N.Y. Crim. Proc. Law § 470.15(1), rejected the defendant's claim that the police were merely using the guise of an administrative inspection as a pretext to gather evidence of a crime. The Appellate Division held, rather, that the inspection of the defendant's junkyard was properly conducted for administrative purposes in accordance with the provisions of the Vehicle and Traffic Law and the New York City Charter. The court rejected the defendant's claim that N.Y. Veh. & Traf. Law § 415-a violates the fourth amendment, and upheld the constitutionality of both that statute and New York City Charter § 436. 112 A.D.2d 1046, 493 N.Y.S.2d 34, Appendix at 9a-10a.

The New York Court of Appeals reversed the order of the Appellate Division and held that both N.Y. Veh. & Traf. Law § 415-a(5) and New York City Charter § 436 violate the fourth amendment of the United States Constitution. The Court of Appeals held that these statutes authorize searches "undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme," 67 N.Y.2d at 344,

---

3 The defendant remains at liberty on $2,500 bail pursuant to an order of the Chief Judge of the New York Court of Appeals dated October 16, 1985. 66 N.Y.2d 761. That order continued the bail set by the Supreme Court, Kings County, by an order dated August 15, 1984, which granted the defendant's motion pursuant to N.Y. Crim. Proc. Law § 460.50 for a stay of execution of the judgment pending determination of his appeal to the Appellate Division.

4 The New York Criminal Procedure Law provides that a guilty plea does not waive the right to appeal an order denying a pretrial motion to suppress evidence. N.Y. Crim. Proc. Law § 710.70(2).

Appendix at 7a, and are for that reason unconstitutional. The court noted that the licensing and record-keeping requirements of section 415-a did suggest an administrative scheme, and held, moreover, that the statutory authorization to conduct unannounced warrantless inspections of the required books and records is constitutionally permissible. *Id.* at 344, Appendix at 8a. The Court of Appeals nevertheless concluded that N.Y. Veh. & Traf. Law § 415-a(5)(a) violates the fourth amendment because it permits searches of vehicles and vehicle parts "notwithstanding the absence of any records against which the findings of such a search could be compared," *id.* at 344-45, Appendix at 8a, and because it authorizes searches by police officers as well as by other regulatory agents, *id.* at 344, Appendix at 7a. The Court of Appeals therefore granted the defendant's motion to suppress physical evidence, vacated his guilty plea, dismissed the counts of Indictment Number 6972/82 charging criminal possession of stolen property, and remitted the case to the trial court for further proceedings. 67 N.Y.2d 338, Appendix at 1a-8a.

This petition for certiorari challenges the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates a Conflict Among the Decisions of the State Courts of Last Resort, and with a Decision of this Court, Concerning the Circumstances in which the Constitution Permits Warrantless Administrative Inspections of Commercial Premises.

Solely on fourth amendment grounds,[5] the court below invalidated a state statute and a city ordinance that authorize warrantless inspections of vehicle dismantling businesses, automobile junkyards, and other businesses dealing in secondhand merchandise. This federal constitutional determination by the New York Court of Appeals is at odds with the decisions of five other state courts of last resort, each of which rejected fourth amendment challenges to warrantless inspection statutes that are similar to the provisions challenged in this case. In addition, the decision below is inconsistent with the decision of this Court in *United States v. Biswell*, 406 U.S. 311 (1972). Each of these conflicts warrants the grant of certiorari to review the judgment in this case.

At least five state courts of last resort have upheld the constitutionality of statutes similar to those struck down by the court below. *See Moore v. State*, 442 So.2d 215 (Fla. 1983); *State v. Tindell*, 272 Ind. 479, 399 N.E.2d 746 (1980); *State v. Barnett*, 389 So.2d 352 (La. 1980); *State v. Wybierala*, 305 Minn. 455, 235 N.W.2d 197 (1975); *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977). In two additional states, intermediate appellate courts have reached the same result. *People v. Easley*, 90 Cal. App.3d 440, 153 Cal. Rptr. 396 (Ct.

5 The decision below twice refers explicitly to the fourth amendment, 67 N.Y.2d at 343, Appendix at 6a, 7a, never refers to the New York Constitution, and relies extensively on decisions of this Court construing the fourth amendment. Moreover, the defendant has consistently framed his claim in federal constitutional terms. The decision below thus indisputably rests solely on the fourth amendment of the United States Constitution.

App.), *cert. denied*, 444 U.S. 899 (1979); *People v. Barnes*, 146 Mich. App. 37, 379 N.W.2d 464 (1985). In each of those cases, the state court rejected a fourth amendment challenge to a statute that authorized warrantless inspections of automobile junkyards, repair shops, manufacturers, or dealers, or of dealers in secondhand goods. The statute in question in each of those cases, as in this case, permits inspection of merchandise on the business premises regardless of whether any required records are produced. In addition, each statute authorizes inspections that seek to uncover criminal evidence at the same time that the inspections further a regulatory objective. Moreover, each statute permits police officers to conduct the inspections. These aspects of N.Y. Veh. & Traf. Law § 415-a(5)(a) and New York City Charter § 436 led the New York Court of Appeals to conclude that the warrantless inspections authorized by the statutes served no administrative purpose, and therefore violated the fourth amendment. 67 N.Y.2d at 343-45, Appendix at 6a-8a. Faced with the same constitutional challenge to materially identical statutes, however, the state courts of last resort in Florida, Indiana, Louisiana, Minnesota, and Virginia, as well as intermediate appellate courts in California and Michigan, all reached the opposite conclusion. This conflict among the state courts alone warrants the grant of certiorari to review the decision below.

The decision below also conflicts with this Court's decision in *United States v. Biswell*, 406 U.S. 311 (1972). In *Biswell* this Court rejected a fourth amendment challenge to a statute that authorizes warrantless inspections of the business premises of federally licensed firearms dealers. That statute permits inspection of a dealer's firearms or ammunition regardless of the presence of required records, *see* 18 U.S.C. § 923(g),[6] just as

6 The statute upheld in *Biswell* provides, in relevant part:

> The Secretary [of the Treasury] may enter during business hours the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . .

(footnote continued on following page)

N.Y. Veh. & Traf. Law § 415-a(5)(a) authorizes inspection of a dismantler's vehicles and parts regardless of the presence of a police book. Moreover, the statute in *Biswell*, like the statutes in this case, authorizes inspections designed to uncover evidence of a crime. Indeed, the defendant in *Biswell* was convicted of a federal crime as a result of the seizure of two sawed-off rifles during the warrantless inspection of his pawn shop. 406 U.S. at 312-13. Yet, despite these similarities between the New York statutes in this case and the statute at issue in *Biswell*, the court below and the *Biswell* Court reached contrary constitutional conclusions.

This Court should grant the writ of certiorari to review the judgment below and to resolve both of these conflicts.

II. The Decision Below Squarely Presents a Significant and Recurring Question Concerning the Constitutionality of Statutes that Authorize Warrantless Administrative Inspections of Commercial Premises.

This case presents an important fourth amendment question that implicates the state interests in controlling the epidemic of motor vehicle theft and in regulating industries uniquely associated with that problem, as well as the privacy interests of numerous vehicle dismantlers, junkyard owners, and secondhand merchandise dealers in their business premises.

The magnitude of the state interest in controlling motor vehicle theft is evident. The prevalence of the problem of motor vehicle theft in New York is concretely documented in the legislative history of N.Y. Veh. & Traf. Law § 415-a.[7] The

---

and (2) any firearms or ammunition kept or stored by such . . . dealer at such premises.

18 U.S.C. § 923(g), *quoted in United States v. Biswell*, 406 U.S. at 311-12 & n.1.

7 In the Governor's memorandum approving a 1979 amendment to the statute, he noted that in 1976 "over 130,000 automobiles were reported stolen in New York, resulting in losses in excess of $225 million," and that motor vehicle theft in the State was "rapidly increasing." Governor's Memorandum approving L. 1979, chs. 691, 692, 1979 N.Y. Laws 1826.

national scope of the problem is evinced by the number of states that have enacted statutes authorizing warrantless inspections of vehicle dismantling businesses, junkyards, and other businesses involving motor vehicles, and by the state court decisions upholding those statutes. *E.g.*, *People v. Easley*, 90 Cal. App.3d at 445, 153 Cal. Rptr. at 399 (automobile dismantling industry is "fraught with public danger" of criminal activity); *Moore v. State*, 442 So.2d at 216 (Fla.) (motor vehicle theft is "widespread and on the increase"); *People v. Barnes*, 146 Mich. App. at 42, 397 N.W.2d at 466 ("automobile theft and the stripping of stolen automobiles to salvage parts are significant national problems which deserve significant governmental attention").

In addition, the discovery of criminal evidence through inspection of these businesses not only furthers New York's interest in prosecuting crimes related to trafficking in stolen property, but simultaneously furthers the independent administrative objective of determining whom the Commissioner of Motor Vehicles should license to operate as a vehicle dismantler. Section 415-a requires a registration as a prerequisite to engaging in that business, N.Y. Veh. & Traf. Law § 415-a(1), and provides that the decision to issue or to revoke a registration may depend on whether the applicant or registrant has been convicted of any crimes relating to motor vehicle theft or to illegal possession of stolen vehicles or parts, *id.* § 415-a(2), (6)(a). Moreover, in light of the ease with which a dismantler's possession of stolen property can be corrected in anticipation of a particular inspection, frequent and unannounced warrantless inspections are essential to furtherance of the State's objectives. *See Donovan v. Dewey*, 452 U.S. 594, 602-03 (1981) (upholding statute authorizing warrantless inspections of mines because many mine safety or health hazards could be easily concealed if advance warning of inspection were obtained); *United States v. Biswell*, 406 U.S. at 316 (upholding statute authorizing warrantless inspections of firearms dealers because they could easily conceal or correct violations on short notice).

The constitutional conclusion of the court below is erroneous, and thus unnecessarily jeopardizes the important state

interests served by the statutes. The court unjustifiably determined that the statutes further no administrative purposes. Moreover, the distinction set forth by the court between the kinds of inspections that are constitutionally permissible and those that are impermissible is both contradictory and unreasonable.

First, the court below erroneously concluded that uncovering evidence of criminality is the sole purpose furthered by the statutorily-authorized inspections. 67 N.Y.2d at 344, Appendix at 7a. The court reasoned that because the inspections served no administrative purpose, they could not be conducted without a warrant. However, section 415-a itself shows that the inspections further the objective, in addition to uncovering criminal evidence, of determining whom should be licensed to operate as a vehicle dismantler. Thus, insofar as the decision below rests on the court's conclusion that the inspections authorized by the statutes serve no administrative purpose, the decision is incorrect.

Second, the court drew an unsupportable distinction between the scope of permissible and impermissible inspections. The court held that the warrantless search of the defendant's junkyard was impermissible because it was purportedly conducted solely to uncover evidence of criminality. The court stated that the fourth amendment would permit, on the other hand, unannounced inspections of required books and records, and apparently of vehicles and vehicle parts for the purpose of comparing them to the records. 67 N.Y.2d at 344-45, Appendix at 8a. Yet, because an examination of books and records is designed to insure compliance with the licensing requirements as well as the record-keeping requirements of the statute, and because operating as a vehicle dismantler without the required registration is a felony, N.Y. Veh. & Traf. Law § 415-a(1), uncovering evidence of criminality is the purpose of an inspection of books and records no less than it is the purpose of a direct inspection of vehicles and parts. Indeed, because the very failure to produce the required records or to permit an inspection is a crime, *id.* § 415-a(5)(a), evidence of a crime can

be uncovered by a mere attempt to inspect books and records. In short, an inspection directed only to books and records is itself designed to uncover criminal evidence. Thus, the court below contradicted its own constitutional standard when it concluded that the Constitution permits warrantless inspections of required books and records, but not inspections of vehicles and parts in the absence of required records.

Moreover, the court's suggestion that a statute could permissibly authorize inspections of vehicles and parts for the purpose of comparing them to records, but not otherwise, is another irrational constitutional distinction. This distinction bestows on vehicle dismantlers the power to control the scope of inspections, because a dismantler could thwart any inspection of merchandise by simply refusing to produce any records and choosing instead to risk the lesser penalties associated with that refusal.[8]

Finally, the court below invalidated the statutes partly because they authorize police officers, rather than only other regulatory agents, to conduct the inspections. 67 N.Y.2d at 344, Appendix at 7a. This aspect of the statutes is wholly unrelated to either the state interests or the privacy interests implicated by the statutes. Therefore, to the extent that the court below struck down the statutes simply because they grant authority to police officers to conduct the inspections, the decision below rests on a flawed fourth amendment analysis.

The petition for certiorari thus should be granted so that this Court can properly decide the significant fourth amendment question presented by this case. Indeed, the need for this Court's clarification of this area of the law is underscored by

---

8 Criminal possession of stolen property valued in excess of $1,500 is a class D felony punishable by an indeterminate prison term of up to two and one-third to seven years. N.Y. Penal Law §§ 70.00(1), (2)(d), (3)(d), 165.50. By contrast, refusing to produce the records that a vehicle dismantler is required to keep is a class A misdemeanor punishable by a maximum determinate prison term of only one year. N.Y. Veh. & Traf. Law § 415-a(5)(a); N.Y. Penal Law § 70.15(1)(a).

People v. Krull, 107 Ill.2d 107, 481 N.E.2d 703 (1985), *cert. granted*, 106 S. Ct. 1456 (1986), which is pending before this Court. *Krull*, like this case, concerns the admissibility of physical evidence seized by police officers pursuant to a statute that authorizes warrantless inspections of automobile junkyards. The only question presented in *Krull*, however, is whether the good faith exception to the exclusionary rule should apply because the search was conducted before any court had held that the statute violated the fourth amendment. The State in that case does not contend that the statute itself is constitutional.[9] *See* Petitioner's Brief on the Merits, *Illinois v. Krull*. This case, unlike *Krull*, squarely presents the question whether the statutes that authorized the inspection of the defendant's junkyard are constitutional.

It is far more important for this Court to decide the underlying question of constitutional standards for administrative inspections in this area, than to decide the derivative question, presented by *Krull*, of what to do while the law is unclear. Clarification of the constitutional status of these statutes will minimize the occasions for reliance on a good faith exception to the exclusionary rule, which has the unhappy effect of validating a concededly illegal search. If this Court decides whether statutes of this type are constitutional,[10] the courts will seldom be called on to approve illegal administrative searches undertaken in good faith, as urged by the State in *Krull*.

---

9 . The statute at issue in *Krull* may well satisfy constitutional standards, but, perhaps because it has been repealed, the State in that case does not press that point.

10 Because this case concerns the constitutionality of both a state statute and a city ordinance, each of which independently authorizes warrantless inspections of junkyards, the case presents an opportunity for additional illustration and clarification of the relevant fourth amendment principles by applying them to both provisions.

CONCLUSION

The states are faced with a pervasive and pressing need to regulate certain industries whose operation will otherwise inflict widespread public harm by facilitating trafficking in stolen motor vehicles. This case concerns the extent to which the limited privacy interests of vehicle dismantlers in their junkyards should preclude the states from effectively addressing this problem, and illustrates the uncertainty regarding the proper resolution of this question. That uncertainty has given rise to a conflict between the decision below and this Court's decision in *Biswell*, a conflict among the state courts of last resort, and conflicts between state legislatures and courts. This Court should grant the writ of certiorari to decide this important fourth amendment question.

Respectfully submitted,

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

**Counsel of Record for the Petitioner*

July 18, 1986

APPENDIX

COURT OF APPEALS
STATE OF NEW YORK

No. 135

Argued March 19, 1986; decided May 8, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

JOSEPH BURGER,

Appellant.

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered August 19, 1985, which affirmed a judgment of the Supreme Court (A. Frederick Meyerson, J., at plea and sentencing; Lewis L. Douglass, J., at suppression hearing; opn 125 Misc 2d 709), rendered in Kings County, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the second degree.

People v Burger, 112 AD2d 1046, reversed.

POINTS OF COUNSEL

Stephen R. Mahler for appellant. I. New York City Charter § 436 and Vehicle and Traffic Law § 415-a (5) (a) are facially unconstitutional and, regardless, were implemented in this case in a manner violative of appellant's constitutional rights. (*People v Cusumano*, 108 AD2d 752; *People v Pace*, 101 AD2d 336, 65 NY2d 684; *Bionic Auto Parts & Sales v Fahner*, 721

F2d 1072; *Flacke v Onondaga Landfill Sys.*, 127 Misc 2d 984; *Donovan v Dewey*, 452 US 594; *Matter of Glenwood TV v Ratner*, 65 NY2d 642; *People v Rizzo*, 40 NY2d 425; *People v Sciacca*, 45 NY2d 122; *Matter of Finn's Liq. Shop v State Liq. Auth.*, 24 NY2d 647; *United States v Chicago R. R. Co.*, 282 US 311.) II. Assuming, arguendo, that the police lawfully entered the junkyard in the first instance, they nevertheless had no legal justification for seizing any property found therein without first securing a search warrant. (*People v Lee*, 58 NY2d 771; *People v Langen*, 60 NY2d 170; *People v Gokey*, 60 NY2d 309; *People v Smith*, 59 NY2d 454; *People v Arnau*, 58 NY2d 27.)

Elizabeth Holtzman, District Attorney (*Leonard Joblove* and *Barbara D. Underwood* of counsel), for respondent. I. The administrative inspection of defendant's junkyard was constitutionally permissible. (*Donovan v Dewey*, 452 US 594; *People v Rizzo*, 40 NY2d 425; *United States v Biswell*, 406 US 311; *Marshall v Barlow's, Inc.*, 436 US 307; *Matter of Glenwood TV v Ratner*, 103 AD2d 322, 65 NY2d 642; *Broadrick v Oklahoma*, 413 US 601; *People v Drayton*, 39 NY2d 580; *People v Merolla*, 9 NY2d 62, 365 US 872; *O'Kane v State of New York*, 283 NY 439; *Peterman v Coleman*, 764 F2d 1416.) II. The warrantless seizure of the stolen property was necessary to avoid risking its disappearance. (*People v Ciaccio*, 45 NY2d 626; *People v Farenga*, 42 NY2d 1092; *Illinois v Andreas*, 463 US 765; *People v Brosnan*, 32 NY2d 254; *Chambers v Maroney*, 399 US 42; *People v Basilicato*, 64 NY2d 103; *Texas v Brown*, 460 US 730; *People v Pace*, 65 NY2d 684; *People v Spinelli*, 35 NY2d 77.)

OPINION OF THE COURT

ALEXANDER, J.

We hold today that Vehicle and Traffic Law § 415-a (5) (a), which authorizes warrantless inspections of vehicle dismantling businesses, and New York City Charter § 436, which authorizes warrantless searches of junkyards and other businesses storing used, discarded or secondhand merchandise, violate the constitutional proscription against unreasonable searches and seizures.

Defendant Joseph Burger is the owner of a junkyard in Brooklyn. Part of his business consists of dismantling automobiles and selling their parts. At about 12:00 noon on November 17, 1982, five plain-clothes New York City police officers assigned to the Auto Crimes Division entered defendant's junkyard, which was enclosed by a metal fence. According to the testimony of one of the officers, there were no buildings in the yard and it contained numerous vehicles and parts of vehicles. Defendant was present at the time, and the officers inquired as to whether he was licensed to dismantle vehicles. Defendant replied that he was not and informed the officers in response to their questions that he did not have a "police book".[1] The police told defendant that they were going to perform a warrantless inspection pursuant to Vehicle and Traffic Law § 415-a.[2]

In the course of the inspection, the officers copied down the vehicle identification numbers (VINs) of several vehicles and parts of vehicles. The police also recorded the serial numbers

---

1. A "police book" refers to the record of all vehicles and parts in the possession of a vehicle dismantler required to be kept by Vehicle and Traffic Law § 415-a (5) (a).

2. Vehicle and Traffic Law § 415-a provides in part: "5. Records and identification. (a) * * * Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. * * * Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises * * * The failure to produce such records or permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor."

from a wheelchair and a handicapped person's walker that were found alongside a dumpster. After checking the VINs and the serial numbers, the officers determined that two of the automobiles had been reported stolen, and that a wheelchair and a walker had been in one of them. The property was seized and defendant was charged with two counts of criminal possession of stolen property in the second degree (Penal Law § 165.45 [1] [3]), three counts of criminal possession of stolen property in the third degree (Penal Law § 165.40) and unregistered operation as a vehicle dismantler (Vehicle and Traffic Law § 415-a [1]). Following denial of defendant's motion to suppress the physical evidence and statements made by him to the arresting officer, defendant pleaded guilty to criminal possession of stolen property in the second degree.

At the hearing on defendant's motion to suppress, one of the officers, John Vega, testified that the function of the Auto Crimes Division was to make daily inspections of vehicle dismantlers' yards and that his unit typically conducted about 5 to 10 inspections a day. Officer Vega did not know how defendant's yard was chosen for inspection that day. He stated that when a police book is not available to check against a yard's inventory, it is normal procedure to record a random sample of VINs and to determine if any of the vehicles had been reported stolen.

The hearing court denied the motion to suppress, holding that the auto junkyard industry is "pervasively regulated" (*see, United States v Biswell*, 406 US 311; *Colonnade Catering Corp. v United States*, 397 US 72) and that Vehicle and Traffic Law § 415-a is constitutional inasmuch as it is sufficiently limited in time, place and scope. Thereafter, reargument of the motion was granted in light of an Appellate Division decision in *People v Pace* (101 AD2d 336, *affd* 65 NY2d 684) that implied in a footnote that section 415-a requires the police to obtain a search warrant in instances where the junkyard owner cannot produce a police book (101 AD2d, at p 339, n 1). Upon reargument, the court adhered to its previous determination, holding that the statute's language authorizes the warrantless inspection of vehicles and parts that are the subject of its

record-keeping requirements and that, unlike the situation in *Pace*, the search in this case was undertaken pursuant to an administrative scheme and not simply as a quest for evidence prompted by police suspicion of criminal activity.

The Appellate Division affirmed, holding that "[i]n the instant case, the police were seeking to administer the regulatory schemes set forth in Vehicle and Traffic Law § 415-a and New York City Charter § 436.[3] The constitutionality of these statutory provisions has recently been upheld by this court in *People v Cusumano* (108 AD2d 752)." (112 AD2d 1046.)

On this appeal, defendant argues that Vehicle and Traffic Law § 415-a and New York City Charter § 436 are facially unconstitutional in that, regardless of the auto junkyard business' status as a closely regulated industry, they authorize warrantless searches that are not designed to further any administrative objective. The People respond that the statutes further the substantial State interest in controlling automobile theft by establishing an administrative scheme requiring automobile dismantlers to be licensed and registered and to maintain detailed records of their inventory showing proof of ownership. The People further argue that by permitting unannounced warrantless searches the statutes allow the police to carry out the State's objective while adequately protecting a junkyard owner's diminished privacy interest.

We previously have had occasion, in *People v Pace* (101 AD2d 336, *affd* 65 NY2d 685, *supra*), to pass on the validity of a junkyard search purportedly undertaken by the police pursuant to the authority of New York City Charter § 436. There, the Appellate Division held, and we agreed, that the search had been undertaken in order to gather evidence of crime, which

---

3. New York City Charter § 436 provides that: "The [police] commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession".

the police already had reason to believe had been or was taking place. Thus, the warrantless search could not be validated by reference to the statute and it was, therefore, unnecessary to examine the statute's constitutionality (*see also, People v Brigante*, 115 AD2d —; *People v Sullivan*, 129 Misc 2d 747). Here, by contrast, the constitutional question is squarely presented since we have before us the type of search contemplated by the statutes.

It is well settled that the Fourth Amendment prohibition against unreasonable searches and seizures is applicable to commercial premises (*e.g., Donovan v Dewey*, 452 US 594, 598, *supra*; *Marshall v Barlow's, Inc.*, 436 US 307, 311-313; *Michigan v Tyler*, 436 US 499, 504-505; *See v City of Seattle*, 387 US 541, 545-546; *Sokolov v Village of Freeport*, 52 NY2d 341; *Matter of Glenwood TV v Ratner*, 103 AD2d 322, 327, *affd* 65 NY2d 642, *appeal dismissed*— US —, 106 S Ct 241). With respect to "certain carefully defined classes of cases" (*Michigan v Clifford*, 464 US 287, 292, & n 2) involving industries that are deemed "pervasively regulated", administrative searches are excepted from the general rule requiring warrants. In order to validate a warrantless administrative search, however, the commercial premises must be part of a pervasively regulated industry and the search itself must be part of a regulatory scheme designed to further an urgent State interest (*e.g., Donovan v Dewey*, 452 US 594, 599-600, *supra; United States v Biswell*, 406 US 311, *supra; Colonnade Catering Corp. v United States*, 387 US 72, *supra*). Also, the State's ability to conduct warrantless inspections must be essential to the effectuation of an administrative scheme (*Donovan v Dewey*, 452 US, at pp 600, 602-603, *supra; United States v Biswell*, 406 US, at p 316, *supra; Bionic Auto Parts & Sales v Fahner*, 721 F2d 1072, 1077). Finally, the inspection must be authorized by a valid statute that is carefully limited in time, place and scope (*e.g., Donovan v Dewey*, 452 US, at pp 603-604; *United States v Biswell*, 406 US, at pp 315-316).

The Supreme Court has distinguished valid administrative inspections from searches that are used to obtain evidence of

criminality (*see, e.g., Donovan v Dewey*, 452 US 594, 598, & n 6, *supra; Camara v Municipal Ct.*, 387 US 523, 530, 535; *see also, Michigan v Tyler*, 436 US 499, 504-506, *supra*). In short, an administrative search must serve an administrative purpose; when designed instead to uncover evidence of a crime the traditional requirements of the Fourth Amendment apply (*see, e.g., Donovan v Dewey*, 452 US, at p 598, n 6; *Michigan v Tyler*, 436 US, at p 512).

The fundamental defect in the statutes before us is that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted "administrative schemes" here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property. Furthermore, an otherwise invalid search of private property is not rendered reasonable merely because it is authorized by a statute, for to so hold would allow legislative bodies to override the constitutional protections against unlawful searches.

Examination of the statutory schemes authorizing warrantless searches upheld by the Supreme Court reveals the shortcomings of the statutes under consideration. In *Donovan v Dewey* (*supra*), the court upheld warrantless inspections of mines authorized by the Federal Mine Safety and Health Act of 1977 (91 US Stat 1290, 30 USC § 801 *et seq.*) to determine compliance with health and safety standards promulgated by the Secretary of Labor pursuant to the Act. In *United States v Biswell* (406 US 311, *supra*), the court upheld warrantless searches of the premises of firearms dealers authorized by the Gun Control Act of 1968 (82 US Stat 1213, 18 USC *et seq.*) to determine compliance with the licensing, record-keeping and occupational tax requirements of that statute. Significantly, in both instances the administrative statutes authorize warrantless inspections to be conducted by agents of the regulatory agency, not police officers.

By contrast, New York City Charter § 436 and Vehicle and Traffic Law § 415-a do little more than authorize general searches, including those conducted by the police, of certain commercial premises. In conducting a search pursuant to

section 436 the police clearly are not determining compliance with any administrative or regulatory scheme. Indeed, this provision contains no record-keeping requirements. Rather, it explicitly authorizes searches to be undertaken "in connection with the performance of *any* police duties" (emphasis added). Vehicle and Traffic Law § 415-a does contain some suggestion of an administrative scheme by imposing licensing and record-keeping requirements, and it authorizes inspectors to make unannounced visits to regulated premises to examine required books and records, as it may properly do (*see, e.g., Matter of Glenwood TV v Ratner*, 65 NY2d 642, *affg on opn of* Titone, J., at 103 AD2d 322, *appeal dismissed* —US—, 106 S Ct 241, *supra*). It fails to satisfy the constitutional requirements for a valid, comprehensive regulatory scheme, however, inasmuch as it permits searches, such as conducted here, of vehicles and vehicle parts notwithstanding the absence of any records against which the findings of such a search could be compared. Defendant admitted prior to the search that he did not have a police book. Thus, as Officer Vega admitted, the ensuing search was undertaken solely to discover whether defendant was storing stolen property on his premises. Indeed, the People concede in their brief (at 22) that "[t]he immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property." Because New York City Charter § 436 and Vehicle and Traffic Law § 415-a (5) (a) permit such warrantless searches, they are facially unconstitutional.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress granted, defendant's guilty plea vacated, the counts of the indictment charging criminal possession of stolen property dismissed, and the case remitted to Supreme Court, Kings County, for further proceedings pursuant to CPL 470.55 (2).

Chief Judge WACHTLER and Judges MEYER, SIMONS, KAYE, TITONE and HANCOCK, JR., concur.

Order reversed, etc.

APPELLATE DIVISION OF THE
NEW YORK SUPREME COURT
SECOND JUDICIAL DEPARTMENT

No. 644 E

August 19, 1985

Mahler & Harris, P.C., Kew Gardens, N.Y. (Stephen R. Mahler of counsel), for appellant.

Elizabeth Holtzman, District Attorney, Brooklyn, N.Y. (Barbara D. Underwood, Peter A. Weinstein and Leonard Joblove of counsel), for respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH BURGER, Appellant.—Appeal by defendant from a judgment of the Supreme Court, Kings County (Meyerson, J.), rendered August 15, 1984, convicting him of criminal possession of stolen property in the second degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial (Douglass, J.), of defendant's renewed motion to suppress certain evidence.

Judgment affirmed. This case is remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50 (5).

Citing this court's opinion in *People v Pace* (101 AD2d 336, *affd* 65 NY2d 684), defendant claims that the warrantless inspection of his automobile junkyard by the police violated his constitutional rights. The instant case is, however, clearly distinguishable from *People v Pace* (*supra*). In *Pace*, the police used the pretext of an administrative inspection to conduct an unconstitutional warrantless search for evidence of a crime. In the instant case, the police were seeking to administer the regulatory schemes set forth in Vehicle and Traffic Law § 415-a and New York City Charter § 436. The constitutionality of these statutory provisions has recently been upheld by this court (*People v Cusumano*, 108 AD2d 752).

Upon review of the record, we find no merit to defendant's claim that, as in *Pace* (*supra*), the police were using the administrative inspection as a pretext to gather evidence of a crime. Thus, the conduct of the police was proper and the judgment should be affirmed. Mangano, J.P., Thompson, Brown and Kunzeman, JJ., concur.

NEW YORK SUPREME COURT
CRIMINAL TERM
KINGS COUNTY

June 11, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

—v—

JOSEPH BURGER,

Defendant.

APPEARANCES OF COUNSEL

Mahler & Harris, P.C. (*Stephen Mahler* of counsel), for defendant. *Elizabeth Holtzman, District Attorney* (*Catherine Wilder* of counsel), for plaintiff.

OPINION OF THE COURT

LEWIS L. DOUGLASS, J.

On May 12, 1983, defendant Burger moved to suppress physical evidence seized from his business premises on the grounds that subdivision 5 of section 415-a of the Vehicle and Traffic Law was unconstitutional. That motion was denied, after a hearing, in a decision by this court dated April 12, 1984.

On April 30, 1984, the Appellate Division decided *People v Pace* (101 AD2d 336). Alleging that the *People v Pace* (*supra*) decision requires a result contrary to that reached by this court in the suppression hearing, defendant requested a renewal and reargument of the previously denied suppression motion and asked for proper and equitable relief. In consideration of the relevant issues of law developed by the Appellate Division in *People v Pace* (*supra*), reargument was granted.

FACTS

Defendant Burger is in the auto junkyard business. His business premises are an open yard containing vehicles and parts of vehicles. His business consists of dismantling vehicles and selling the vehicle parts.

Police officers assigned to the Auto Crimes Division, which generally handles inspections of auto junkyards and whose officers have received special training, conducted an inspection of the defendant's yard. Upon this inspection, the officers found that the defendant did not have a "police book", which all auto junkyards are required to keep. (See Vehicle and Traffic Law, § 415-a, subd 5, par [a].) Continuing their inspection of the yard, the officers gave the police radio dispatcher the VIN number of a vehicle in the defendant's yard and received information that the vehicle was stolen. Subsequently, the officers arrested the defendant and seized the stolen property.

The issue on reargument is whether the officers of the Auto Crimes Division had the power to enter the defendant's yard and conduct an inspection in the manner and under the circumstances described above.

SUBDIVISION 5 OF SECTION 415-A OF THE VEHICLE AND TRAFFIC LAW

Subdivision 5 of section 415-a of the Vehicle and Traffic Law states that, "[u]pon request of an agent of the commissioner or of any police officer * * * a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this statute".

In the original suppression hearing, this court found that subdivision 5 of section 415-a of the Vehicle and Traffic Law was constitutional. The statute was found to be limited in time, place and scope because the inspection is done during "regular business hours", on "all motor vehicles, trailers and major component parts thereof", and "only those vehicles or parts subject to the record-keeping requirement".

This court also found that defendant's auto junkyard business was a member of a "pervasively regulated" industry. As a member of a pervasively regulated industry, defendant's business may be subjected to warrantless inspections (*Donovan v Dewey*, 452 US 595; *United States v Biswell*, 406 US 311; *Colonnade Corp. v United States*, 397 US 72; *People v Rizzo*, 40 NY2d 425). That is exactly what occurred in this case. Officers of the Auto Crimes Division entered defendant's auto junkyard to conduct a warrantless inspection.

On reargument, defendant alleges that footnote 1* of the majority opinion in *People v Pace* (101 AD2d 336, *supra*) requires the officers to seek a search warrant when the auto junkyard does not produce a police book. The court finds this argument unpersuasive. The footnote merely states that the court did not apply subdivision 5 of section 415-a in *People v Pace* (*supra*). The Appellate Division pointed to the lack of a police book as further evidence that, in that case, the police officers were not conducting an administrative inspection but gathering evidence for criminal prosecution.

Further support for rejection of defendant's allegation is found in the wording and intent of subdivision 5 of section 415-a of the Vehicle and Traffic Law. The statute expressly states that an agent or police officer may examine the records, any vehicles or parts of vehicles which are subject to the record-keeping requirements of the statute. The presence of a police book is not given as a prerequisite to a warrantless inspection of vehicles or parts of vehicles. Obviously, to require a warrant for an inspection of the items in the yard whenever there is no police book would hinder the power of the officers and frustrate the purpose of the statute, which is to discourage auto junkyards from dealing in stolen goods. This concern was

---

* The *People v Pace* (*supra*) footnote reads, "Subdivision 5 of section 415-a of the Vehicle and Traffic Law, the statute under which the police officers said they were acting, has no application. While this section requires dismantlers to keep a police book, the book was missing when the officers entered and it would thus have been impossible for the officers to exercise the alleged implied authority to compare the book entries to the contents of the yard."

well put in *People v Tinneny* (99 Misc 2d 962, 969-970), where the court stated the following: "It is unavailing for defendant to contend that only his records but not his inventory were subject to inspection. The purpose of the record keeping is to insure that vehicles or the parts thereof are lawfully dealt with, hence deterring the acquisition and disposition of stolen items. Without the ability to substantiate statutory compliance by visual examination of the defendant's inventory, the intent of the statute, requiring the keeping of the records would be frustrated if not rendered entirely nugatory."

Although it seems proper to find that subdivision 5 of section 415-a of the Vehicle and Traffic Law authorized the Auto Crimes Division officers' inspection of the defendant's yard, this court need not decide this case on subdivision 5 of section 415-a alone. The District Attorney has alleged that, both subdivision 5 of section 415-a of the Vehicle and Traffic Law and section 436 of the New York City Charter permit this inspection.

Section 436 of the New York City Charter

Section 436 of the New York City Charter, which is entitled: "Powers over certain trades", provides the following: "The [police] commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise or auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise and auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both."

In *People v Pace* (101 AD2d 336, *supra*), the Appellate Division examined the authority of the police under section 436 of the New York City Charter. In that case, the officers were checking the registration of an automobile when a truck carrying a portion of a car body passed by. When the officers noticed that the VIN plate was removed from the car body, they placed the truck's driver under arrest. At that point, a truck carrying two front ends of late model cars passed by. The officers discovered that the parts came from Economy Auto Salvage, a company owned by the two defendants in that case. When the officers arrived at Economy Auto Salvage, they were told that the police book had been stolen. The officers then "undertook to survey the yard, not for the purposes of an administrative inspection but expressly to gather evidence of a crime." (101 AD2d, at p 338.) The court concluded that "[b]ecause we find that the search undertaken here was not for administrative purposes, we hold that the statute can have no application and reverse." (101 AD2d, at p 337.) The court's decision was based on the fact that the police officers were on a "mission * * * to gather evidence of a crime rather than to administer any regulatory scheme." (101 AD2d, at p 340.) Judge Mangano's dissent points out that, "Although not expressly stated in the majority opinion, it clearly appears that the majority is of the view that the police possessed probable cause to search the junkyard and relied on the pretext of an administrative search to excuse their failure to obtain a search warrant." (101 AD2d, at p 343.) Clearly, the holding in *People v Pace* (*supra*) is that a warrant is not required for an administrative inspection but is required when the inspection is actually a quest for evidence to be used in a criminal prosecution.

The facts in the present case materially differ from the facts in *People v Pace* (*supra*). First of all, the officers in this case were assigned to the Auto Crimes Division, but in *People v Pace* (*supra*), they were regular police officers. Understandably, it is much better, in terms of protecting the defendant's rights, to allow a specialized unit the authority to invade the privacy of a pervasively regulated industry than it is to allow

all police officers to have such powers. Also, the fact that they were Auto Crimes Division officers tends to disprove the argument that the administrative inspection was a pretext for a criminal investigation. Since these officers are assigned to the division that carries out inspections of auto junkyards, it is logical to believe that they were actually conducting an administrative inspection when they showed up at the defendant's place of business.

Also, the lack of evidence of any arousal of suspicion on the part of the officers indicates that there was no reason to gather evidence of a crime. The officers did not stop any trucks or notice any missing VIN plates before going to the defendant's yard. Indeed, when the officers arrived at the defendant's yard, they had no reason to believe that the defendant may be dealing in stolen goods. The fact that the defendant was found to be in possession of stolen property does not prove that the officers entered the yard in order to find stolen property.

The defendant stressed the fact that the officers had no contact with the Department of Motor Vehicles and that there was no set procedure for the inspection of auto junkyards. Both of these factors are irrelevant. The statute expressly states that the police commissioner has the power to administer section 436. Therefore, the officers of the Auto Crimes Division did not have to contact the Department of Motor Vehicles, or any other agency, before conducting an inspection of the defendant's business.

As for the procedure used, it does not run contrary to section 436. Indeed, there is no required procedure to be followed, and the fact that the officers did not have a set procedure for making the inspections does not diminish their power under section 436 of the New York City Charter. Cases that have examined the procedures for regulating the auto junkyard industry have concluded that, when a person enters such a pervasively regulated industry, he does so with the knowledge that he will be subjected to the supervision of the State (*People v Pace*, 111 Misc 2d 488; *People v Tinneny*, 99 Misc 2d 962, *supra*). The procedure used in the present case is an acceptable form of such supervision.

Defendant argued that an administrative warrant would protect the limited privacy rights of junkyard owners. Under an administrative warrant the officers would gain access to the junkyard only if they showed, under a less than probable cause standard, that the inspection was in pursuit of an administrative plan (*People v Pace*, 101 AD2d 336, *supra*). The Supreme Court has approved the concept of an administrative warrant (*Marshall v Barlow's, Inc.*, 436 US 307), but New York does not require officers to seek a warrant before conducting an administrative inspection of an auto junkyard. Therefore, the entry onto defendant's yard is permitted by section 436 of the New York City Charter as a part of an administrative inspection of defendant's business.

Once on the premises, the officers inspected the "articles of merchandise" as authorized under section 436. The lack of a police book is irrelevant when applying section 436 of the New York City Charter rather than subdivision 5 of section 415-a of the Vehicle and Traffic Law.

When the officers discovered that the vehicle was stolen, they had reasonable cause to arrest defendant Burger for possession of stolen property. The vehicle, as stolen property in plain view, was properly seized as incident to a lawful arrest (*People v Tinneny, supra; People v Brosnan*, 32 NY2d 254).

In conclusion, this court finds that the Auto Crimes Division officers' entrance onto defendant's yard and inspection of the items in the yard were authorized by section 436 of the New York City Charter as an administrative inspection. In addition, defendant's arrest, and seizure of the stolen property, were proper.

Therefore, defendant's motion to suppress is denied.

NEW YORK SUPREME COURT
KINGS COUNTY
(CRIMINAL TERM—PART 40)
DOUGLASS, J.
April 12, 1984
Indictment No. 6972/82

THE PEOPLE OF THE STATE OF NEW YORK
vs.
JOSEPH BURGER

MEMORANDUM

Defendant moves to suppress physical evidence seized from his business premises on the ground that Vehicle and Traffic Law, Section 415(a)(5) is unconstitutional

Defendant's argument is two-fold: (1) that the auto junkyard business is not a "pervasively regulated" industry, and (2) that the inspection is not limited in time, place and scope.

The general rule is that warrantless administrative searches are invalid. An exception to that rule is where the search is in a "pervasively regulated" industry (*United States v Biswell*, 406 US 311; *Colonnade Corp. v United States*, 397 US 72). Defendant argues that the auto junkyard industry is not such a business. However, several well-reasoned decisions have already found that "* * * the state has unequivocally indicated that it considers such business to be within the class of 'pervasively regulated' industries" (*People v Garcia*, 111 Misc 2d 550, citing *People v Tinneny*, 99 Misc 2d 962; *People v Sylvester*, nylj, 11/20/81, p. 6, col 4; see also People Pace, 111 Misc 2d 488).

Defendant next argues that the statute is unconstitutional because it fails to limit the search in time, space and scope. The court finds this argument unpersuasive. The search is limited to the record of "all motor vehicles, trailer, and major component parts thereof," and to "only those vehicles or parts subject to the record-keeping requirement." It may only be done during "regular business hours." Therefore, the court finds that the statute is limited in time, place and scope.

Defendant further argues that regardless of the constitutionality of the statute, the police had no legal right to seize the automobile without a search warrant. However, once the officers had reasonable cause to believe that the property was stolen, they had the right to arrest the defendant and seize the property. Here, the officer testified that he called the VIN number into the radio dispatcher, and received information that the vehicle was stolen. Therefore, defendant's arrest and seizure of the property was proper.

Accordingly, defendant's motion to suppress is denied.

/s/ L. L. DOUGLASS
J.S.C.

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, *Chief Judge*, Presiding

No. 135

The People &c.,

Respondent,

v.

Joseph Burger,

Appellant.

The appellant in the above entitled appeal appeared by Mahler and Harris, P.C.; the respondent appeared by Hon. Elizabeth Holtzman, District Attorney, Kings County.

The Court, after due deliberation, orders and adjudges that the order is reversed, defendant's motion to suppress granted, defendant's guilty plea vacated, the counts of the indictment charging criminal possession of stolen property dismissed, and the case remitted to Supreme Court, Kings County, for further proceedings pursuant to CPL 470.55(2). Opinion by Judge Alexander. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Titone and Hancock concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Kings County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 8, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Vehicle and Traffic Law § 415-a:

> 1. Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class E felony.
>
> . . . .
>
> 2. Application for registration. An application for registration as a vehicle dismantler . . . shall be made to the commissioner on a form prescribed by him which shall contain the name and address of the applicant and the names and addresses of all persons having a financial interest in the business. Such application shall contain a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a listing of all arrests for any such violations by the applicant and any other persons required to be named in such application. The application shall also contain the business address of the applicant and may contain any other information required by the commissioner.
>
> . . . .

> 5. Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner or which would be eligible to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. . . . The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.
>
> . . . .
>
> 6. Suspension, revocation and refusal to renew a registration; civil penalty. (a) A registration may be suspended or revoked, or renewal of a registration refused upon a conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts, or after the registrant has had an opportunity to be

heard upon any change of status of the registrant which would have resulted in refusal to issue a registration, any false statement in an application for a registration, any violation of subdivision five of this section or regulations promulgated by the commissioner with respect to this section, or any violation of title ten of this chapter.

New York City Charter § 436:

The commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both.

86-80

No. 8680

In The Supreme Court of the United States

October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-vs.-

JOSEPH BURGER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

MAHLER & HARRIS, P.C.
STEPHEN R. MAHLER
Of Counsel
125-10 Queens Boulevard
Kew Gardens, NY 11415
(718) 268-6000
Attorneys for Respondent

Dick Bailey Printers. 203 Port Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

12pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York Vehicle and Traffic Law §415-a and New York City Charter §436, authoritatively construed by the New York Court of Appeals as authorizing general warrantless searches of commercial premises by police officers to obtain evidence of criminal activity, rather than to assure compliance with a valid, comprehensive, regulatory scheme, were properly found to be violative of the constitutional protections against unreasonable searches and seizures.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 8680

In The
Supreme Court of the United States

October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-vs.-

JOSEPH BURGER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, JOSEPH BURGER, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the New York Court of Appeals' opinion in this case. That opinion is reported at 67 N.Y.2d 338, __N.E.2d__ (1986).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the Decision Below nor the Record Raises the Question Presented in the Petition.

Petitioner phrases the question presented as whether the relevant New York statutes are violative of the Fourth Amendment to the United States Constitution "merely because the violations that the [administrative] inspection seeks to uncover for administrative purposes also con-

stitute evidence of crimes." That, however, begs the holding of the Court of Appeals.

The Court of Appeals, authoritatively construing New York Vehicle and Traffic Law §415-a and New York City Charter §436, "that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted 'administrative schemes' here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property" (7a).

Although petitioner urges that the Court of Appeals "unjustifiably determined that the statutes further no administrative purposes" (12), this Court, of course, is bound by the construction of the New York Court of Appeals. Moreover, petitioner offers no legitimate administrative purpose in any event. The "discovery of criminal evidence through inspection of *** businesses" hardly constitutes an "independent administrative objective of determining whom the Commissioner of Motor Vehicles should license to operate as a vehicle dismantler" (110). By a parity of logic, all commercial premises, of whatever sort, should be subject to random "administrative" inspection. In fact, there would be no logical reason why motorists should not be randomly stopped and their driving licenses and registration certificates examined, for there certainly is an independent "objective" of assuming that only licensed drivers operate motor vehicles, and that such vehicles are covered by liability insurance, as mandated by New York law (New York Insurance Law §3420[e]; New York Vehicle and Traffic Law §312[1][a]). Despite such "administrative" overtones, *Delaware v. Prouse,* 440 U.S. 648 (1979), rejects such an approach.

Nor did petitioner urge, or the Court of Appeals conclude, that the Fourth Amendment to the United States Constitution precluded a state from adopting *any* administrative search scheme in this area. Throughout the proceedings, and particularly in his brief to the Court of Appeals (1a-2a), petitioner urged that a carefully tailored statute would pass constitutional muster, and offered the statute at issue in *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072 (7th Cir. 1983) as illustrative. So, too, the Court of Appeals plainly indicated that the New York State Legislature was free to enact "a comprehensive regulatory scheme" which would permit administrative inspections (7a). Consequently, this case does not present the opportunity to pass upon a broad issue of public importance. Rather, all that is involved are two New York statutes which may be revised by the New York Legislature to remedy defects identified by the New York Court of Appeals and to conform to statutory provisions elsewhere.

2. The Decision Below is in Conformity with the Principles Enunciated by this Court and does not Present a Conflict of Authority nor a Significant and Recurring Issue Concerning Administrative Searches.

This Court has made it abundantly clear that the constitutional protections against unreasonable searches and seizures are applicable to commercial premises. *See, Donovan v. Dewey,* 452 U.S. 594 (1981); *Marshall v. Barlows, Inc.,* 436 U.S. 307 (1978); *See v. City of Seattle,* 397 U.S. 72 (1970). As a general rule, administrative searches can be conducted on the basis of an administrative warrant, issued on a less than probable cause standard. *Donovan v. Dewey, supra.* Certain "pervasively regulated" industries, however, may be subject to warrantless administrative inspections, where the commercial premises are part of the pervasively regulated industry and

the search itself part of a regulatory scheme designed to further an urgent state interest. *Donovan v. Dewey, supra,* at 599-600; *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). The need for warrantless inspection must be essential to the effectuating of an administrative scheme, and the inspection limited in time, place and scope by statute. *Donovan v. Dewey, supra* at 600, 602-604; *United States v. Biswell, supra* at 316; *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1076-1077, *supra.*

Assuming, for the sake of argument, that the used auto parts industry is "pervasively regulated," as did the Court of Appeals, the relevant statutes do not pass constitutional muster.[1] First, the statutes do not operate in accordance with any administrative scheme. They are designed to allow police officers to conduct warrantless searches for Penal Law violations, not to insure licensing requirements.

New York City Charter §436 explicitly permits police officers to search commercial property, at any time, "in connection with the performance of *any* police duties" (emphasis supplied). While New York Vehicle and Traffic Law §415-a does have some administrative aspects, the searches it authorizes are not related to an administrative scheme. As Police Officer Vega testified at the suppression hearing, and the Court of Appeals found, "the ensuing

1. The relevant scheme in *Biswell* involved firearms, and the scheme in question in *Colonnade Catering* involved liquor. The history of regulation of these industries is obviously quite different from that of the used auto parts industry, and it might very well be that the used auto parts industry cannot be analogized to either the firearms or the liquor industries for the purpose of administrative inspections. *Cf. Marshall v. Barlows, Inc.,* 436 U.S. 307, *supra.*

search was undertaken solely to discover whether defendant was storing stolen property on his premises," not to ascertain whether there had been compliance with any regulatory scheme (8a). Indeed, the Court of Appeals quoted petitioner's concession in its brief, "that 'the immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property' " (8a, quoting brief at 22).

Nor are these statutes carefully tailored, as required by *Donovan v. Dewey, supra.* Instead, the statutes vest police officers with "unbridled discretion" as to when, whether, where and why such warrantless searches are to take place and their frequency. New York City Charter §436, in fact, is not even limited to reasonable business hours.

The statute sustained in *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1076, *supra,* offers a useful contrast. That statute was plainly administrative in purpose and execution. Designated representatives of the Secretary of State of Illinois (the motor vehicle licensing agent of that state) were authorized to make administrative " 'inspections *** for the purpose of reviewing records required to be maintained *** for accuracy and completeness and reviewing and examining the premises of the licensee's established place of business for determining the accuracy of the required records. Premises that may be inspected in order to determine the accuracy of the books and records required to be kept includes all premises used by the licensee to store vehicles and parts that are reflected by the required books and records . . .' ". *Ibid.,* quoting Illinois Vehicle Code §5-403(1). Inspection could be initiated while business was being conducted or work being performed, *ibid.,* quoting Illinois Vehicle Code §5-403(4), were to be limited to 24 hours in duration, *ibid.,* quoting Illinois Vehicle Code §5-403(5), and were limited to six

warrantless inspections in a six month period. *Ibid.*, quoting Illinois Vehicle Code §5-403(7). Other state statutes upheld by the state courts cited by respondent contain similar safeguards, thus rendering these cases totally inapposite and totally unpersuasive here.

The purported conflict with *United States v. Biswell,* 406 U.S. 311, *supra,* is also illusory. In *Biswell,* this Court upheld warrantless inspections of firearms dealers which wre conducted pursuant to the Gun Control Act of 1968. The inspections were conducted by administrative agents, not police officers, in order to ascertain whether there had been compliance with the licensing, record-keeping and occupational tax requirements of that statute.

In sharp contrast to *Biswell,* the statutes in this case authorize general warrantless police searches for evidence of Penal Law violations, i.e. stolen property, not to insure compliance with any administrative scheme. Neither *Biswell,* nor any other decision cited by petitioner holds that such statutes are constitutionally permissible. The Court of Appeals of New York carefully analyzed *Biswell* and recognized the distinctions which petitioner refuses to perceive (7a-8a).

CONCLUSION

This case involves two unique New York statutes which purport to authorize police officers to conduct general warrantless searches for evidence of crime, rather than in order to insure compliance with any regulatory scheme, as expressly conceded by petitioner in its Court of Appeals brief at p. 22. In accordance with the principles enunciated by this Court, the Court of Appeals of New York properly held that these statutes were unconstitutional. It left the Legislature of the State of New York free, however, to draft a more comprehensive and carefully tailored statute which would meet such objectives. Accordingly, the case does not present broad and recurring issues which would warrant review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respecfully submitted,

MAHLER & HARRIS, P.C.
STEPHEN R. MAHLER,
of Counsel

(3)

No. 86-80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JOINT APPENDIX

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District
Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

Counsel for the Petitioner

STEPHEN R. MAHLER*
Mahler & Harris, P.C.
125-10 Queens Boulevard
Kew Gardens, New York 11415
(718) 268-6000

Counsel for the Respondent

**Counsel of Record*

PETITION FOR CERTIORARI FILED JULY 18, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

10 PP

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-80

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Chronological List of Relevant Proceedings

April 19, 1983	Defendant arraigned on Indictment Number 6972/82 in New York Supreme Court, Kings County.
May 12, 1983	Date of defendant's motion seeking, inter alia, to suppress physical evidence.
March 1, 1984	Hearing held on defendant's motion to suppress physical evidence.
April 12, 1984	Date of decision denying defendant's motion to suppress.
June 11, 1984	Date of decision after reargument adhering to denial of defendant's motion to suppress.
June 27, 1984	Defendant entered guilty plea.

August 15, 1984	Sentence imposed and judgment of conviction entered. Bail set pending determination of appeal to Appellate Division.
August 19, 1985	Judgment of conviction affirmed by Appellate Division, Second Judicial Department.
October 16, 1985	Leave to appeal to New York Court of Appeals granted, and bail continued.
May 8, 1986	Order of Appellate Division reversed by New York Court of Appeals, and case remitted to trial court for further proceedings.

INDICTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Indictment No. 6972/82

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH BURGER,

Defendant

COUNTS

CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE
(2 COUNTS)

CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE THIRD DEGREE
(3 COUNTS)

VEHICLE AND TRAFFIC LAW SECTION 415.A.1

A TRUE BILL

ELIZABETH HOLTZMAN
District Attorney

/s/ Norma Davis
Foreman

FIRST COUNT

The Grand Jury of the County of Kings, by this Indictment accuse the defendant of the crime of Criminal Possession of Stolen Property in the Second Degree, committed as follows:

The defendant on or about November 17, 1982 in the County of Kings, with intent to benefit himself and a person other than an owner thereof, knowingly possessed stolen property, to wit: a 1974 Chevrolet Automobile vehicle identification number 1L47H4Y166437 and a 1982 Chevrolet transmission and automobile component parts vehicle identification number 2G1AL69J5C1136040, and is in the business of buying, selling and otherwise dealing in property.

SECOND COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of Criminal Possession of Stolen Property in the Second Degree, committed as follows:

The defendant on or about November 17, 1982, in the County of Kings, with intent to benefit himself and a person other than an owner thereof and to impede the recovery by an owner thereof, knowingly possessed stolen property having an aggregate value of more than Two Hundred and Fifty Dollars, to wit: A wheelchair, serial number 6-114226, Care Co. #8999, owned by Julius Cohen.

THIRD COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of Criminal Possession of Stolen Property in the Third Degree committed as follows:

The defendant on or about November 17, 1982, in the County of Kings, with intent to benefit himself and a person other than an owner thereof, and to impede the recovery by an owner thereof, knowingly possessed stolen property, to wit: A silver metal walker with wheels owned by Julius Cohen.

FOURTH COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of Criminal Possession of Stolen Property in the Third Degree committed as follows:

The defendant on or about November 17, 1982, in the County of Kings, with intent to benefit himself and a person other than an owner thereof and to impede the recovery by an owner thereof, knowingly possessed stolen property, to wit: a 1982 Chevrolet automobile transmission and automobile component parts vehicle identification number 2G1AL69J5C1136040 owned by Julius Cohen.

FIFTH COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of Criminal Possession of Stolen Property in the Third Degree committed as follows:

The defendant on or about November 17, 1982, in the County of Kings, with intent to benefit himself and a person other than an owner thereof and to impede the recovery by an owner thereof, knowingly possessed stolen property, to wit: a 1974 Chevrolet automobile vehicle identification number 1L47H4Y166437 owned by Mark Jacoby.

SIXTH COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of Violation of Section 415-A.1 of the vehicle and Traffic Law committed as follows:

The defendant on or about November 17, 1982, in the County of Kings, engaged in the business of buying motor vehicles and trailers for the purpose of dismantling the same for the parts and reselling such vehicles as scrap, without having been issued a certificate of registration in accordance with the provisions of this section.

/s/ Elizabeth Holtzman
ELIZABETH HOLTZMAN
DISTRICT ATTORNEY

NOTICE OF MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM

Ind. #6972/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOSEPH BURGER

Defendant

[Sections requesting relief unrelated to the issues raised by the petition for certiorari have been deleted.]

PART IV

The defendant seeks a further Order, pursuant to CPL 710.20 subds. 1 & 4, precluding the People from introducing during the trial of this indictment any of the evidence, both tangible and intangible, obtained as a result of the police search of premises known as 5702 58th Street in Kings County on November 17, 1982, upon the grounds that such a search and seizure was made in violation of those of his rights as guaranteed by the Fourth and Fourteenth Amendments to the

United States Constitution and Article I, Sec. 12 of the New York State Constitution.

Dated: Kew Gardens, New York
May 12, 1983

Yours, etc.

MAHLER & HARRIS, P.C.
Attorneys for Defendant
Office & P.O. Address
125-10 Queens Boulevard
Kew Gardens, N. Y. 11415

TO:

HON. ELIZABETH HOLTZMAN
District Attorney of Kings County
Municipal Building
Brooklyn, New York

[The title of the case has been deleted.]

STATE OF NEW YORK)
: SS:
COUNTY OF QUEENS)

JOSEPH BURGER, being duly sworn, deposes and says:

That I am the above captioned defendant and make this affidavit in support of the instant motion.

[Allegations in support of requests for relief unrelated to the issues raised by the petition for certiorari have been deleted.]

PART IV

That on November 17, 1982, New York City police officers conducted a warrantless search of my business, an automobile junkyard located at 5702 58th Street in Kings County.

They did so without a warrant, without my consent, without probable cause to believe that there was criminal activity thereat, without exigent circumstances and in the absence of any of the other carefully defined exceptions to the legal principle that all warrantless searches are unlawful.

Moreover, if the police claim to have conducted the aforesaid search solely on the authority bestowed upon them by Ch.18, Sec. 436 of The New York City Charter and § 436-a(5) [sic; § 415-a(5)?] of the VTL, it is my contention that such statutes, as they apply to my premises, as they are drafted insofar as they authorize warrantless searches of business premises in general and, in this instance, in the manner in which they were executed, are unconstitutional and I request this Court to so hold.

WHEREFORE, it is respectfully requested that my motion be granted in its entirety and that I be afforded such other, further and different relief as to the Court may seem just, proper and equitable.

/s/ Joseph Burger
JOSEPH BURGER

Sworn to before me this
12th day of May, 1983

/s/ Stephen R. Mahler

No. 86-80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

**Counsel of Record for the Petitioner*

December 6, 1986

QUESTION PRESENTED

Whether the fourth amendment of the United States Constitution disables the State from conducting an otherwise valid warrantless administrative inspection of commercial premises in a pervasively regulated industry, pursuant to section 415-a of the New York Vehicle and Traffic Law and section 436 of the New York City Charter, merely because the violations that the inspection is designed to uncover for administrative purposes also constitute evidence of crimes.

LIST OF PARTIES

The petitioner is the State of New York, represented in this criminal prosecution by Kings County District Attorney Elizabeth Holtzman. The respondent is Joseph Burger.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-80

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App., pp. 1a-8a) is reported at 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986). The opinion of the Appellate Division (Pet. App., pp. 9a-10a) is reported at 112 A.D.2d 1046, 493 N.Y.S.2d 34 (2d Dep't 1985). The opinion of the trial court following reargument (Pet. App., pp. 11a-17a) is reported at 125 Misc.2d 709, 479 N.Y.S.2d 936 (Sup. Ct. Kings County 1984). The original opinion of the trial court (Pet. App., pp. 18a-19a) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals (Pet. App., pp. 20a-21a) was rendered on May 8, 1986. On June 18, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including July 18, 1986. The petition for a writ for certiorari was filed on that date and was granted on October 6, 1986. 107 S. Ct. 61. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(reproduced as an Appendix to this Brief)

1. United States Constitution, Fourth Amendment

2. New York Vehicle and Traffic Law § 415-a

3. New York City Charter § 436

STATEMENT OF THE CASE

The New York State Vehicle and Traffic Law (VTL) § 415-a provides that vehicle dismantlers must be licensed, requires them to maintain records of all vehicles coming into their possession, and authorizes warrantless inspections of their premises during regular business hours for the purpose of examining the records and the vehicles on the premises (App., pp. 1a-10a). The New York City Charter § 436 similarly authorizes warrantless inspections of the records and inventory of all dealers in secondhand merchandise within the city (App., pp. 10a-11a).

In this case defendant Joseph Burger challenged the constitutionality of those statutes by moving to suppress evidence discovered during an inspection of his junkyard made pursuant to the statutes (J.A., pp. 6a-8a). The New York State Supreme

Court denied his motion after a hearing, and adhered to that decision after reargument. Defendant pled guilty to criminal possession of stolen property and appealed the denial of his motion to suppress.[1] The Appellate Division, Second Department, affirmed, upholding the constitutionality of both statutes and rejecting the claim that the officers were using the administrative inspection as a pretext to gather evidence of crime. The New York Court of Appeals reversed, holding that the statutes fail to satisfy the requirements of a valid warrantless administrative inspection scheme, and therefore violate the fourth amendment of the United States Constitution. The State challenges that determination.

The Motion to Suppress Physical Evidence

Two witnesses testified at the hearing on defendant's motion to suppress the evidence discovered during the inspection of his junkyard: Police Officer John Vega, who carried out the inspection with other officers, and defendant Joseph Burger. Their testimony established the following facts.

On November 17, 1982, defendant Joseph Burger was the owner of a junkyard in Brooklyn, New York, where he engaged in the business of dismantling automobiles and selling their parts. The junkyard was an open space containing no buildings, enclosed by a metal fence. At about noon on that date, five plainclothes New York City police officers assigned to the Auto Crimes Division entered defendant's junkyard to conduct a routine warrantless inspection pursuant to VTL § 415-a. The Auto Crimes Division was charged with the enforcement of VTL § 415-a, and in that connection made daily inspections of vehicle dismantlers' yards, typically conducting five to ten inspections a day. The testifying officer did not know any particular reason why defendant's yard was selected for inspection that day, but he knew that the Division

---

1 New York law provides that a guilty plea does not waive the right to appeal an order denying a pretrial motion to suppress evidence. N.Y. Crim. Proc. Law § 710.70(2).

had compiled a list of licensed and unlicensed vehicle dismantlers in New York City.

As the officers approached the yard, they saw through the open gate two workers using a torch to dismantle a truck. The officers entered the yard and asked defendant for his license and records. Defendant said he had neither. The officers then announced their intention to inspect the premises pursuant to VTL § 415-a. Defendant replied "Go right ahead."

In the course of their inspection, which took about half an hour, the officers noted the vehicle identification numbers of several automobiles on the premises, and the serial number of a wheelchair that was leaning against a dumpster in the yard. After the officers called in the identification numbers of the cars, and called the rental agency whose name appeared on the wheelchair, they learned that at least two cars, the wheelchair, and a walker also on the premises had been reported stolen. Defendant was arrested and indicted on several counts of criminal possession of stolen property (N.Y. Penal Law §§ 165.40 (misdemeanor), 165.45[1] (felony because value exceeds $250), [3] (felony because defendant is in the business of dealing in property)) and one count of unregistered operation as a vehicle dismantler (VTL § 415-a[1]) (J.A., pp. 3a-5a).

After the suppression hearing, the court rejected defendant's claim that VTL § 415-a(5), which authorized the warrantless inspection, violates the fourth amendment. In a decision dated April 12, 1984, the court denied the motion to suppress the physical evidence seized from defendant's junkyard. The hearing court concluded that the automobile junkyard industry was "pervasively regulated" within the meaning of this Court's decisions in *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and was therefore a proper subject for a warrantless administrative inspection scheme. The hearing court concluded, in addition, that VTL § 415-a(5) properly limited the

time, place, and scope of the searches it authorized, and thus satisfied constitutional requirements (Pet. App., pp. 18a-19a).

The hearing court granted reargument of defendant's motion in light of the subsequent decision of the Appellate Division in *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985). *Pace* concerned an analogous local ordinance, New York City Charter § 436, which authorizes warrantless inspections of junkyards and other businesses dealing in secondhand merchandise. In *Pace* the court suppressed evidence obtained as a result of such a search, rejecting the claim that the search was authorized by Charter § 436. The court reached that result by holding that the search at issue was not in fact authorized by Charter § 436 because it was prompted solely by advance suspicion of criminal activity and therefore was not undertaken for administrative purposes.

On reargument in this case, defendant urged the court to apply the *Pace* analysis, but the court distinguished *Pace* on its facts. The hearing court specifically found that in this case, unlike in *Pace*, "when the officers arrived at the defendant's yard, they had no reason to believe that the defendant may be dealing in stolen goods," 125 Misc.2d at 714, 479 N.Y.S.2d at 940 (Pet. App., p. 16a), and therefore the inspection of defendant's yard was conducted for administrative purposes. Thus, the inspection in this case was authorized by New York City Charter § 436 as well as by VTL § 415-a(5). In a decision dated June 11, 1984, the hearing court accordingly adhered to its previous determination and denied defendant's motion to suppress the property seized as a result of the inspection. 125 Misc.2d 709, 479 N.Y.S.2d 936 (Pet. App., pp. 11a-17a).

The Guilty Plea and the Sentence

On June 27, 1984, defendant pled guilty to criminal possession of stolen property in the second degree (N.Y. Penal Law § 165.45[3]),[2] in full satisfaction of the charges contained in the indictment as well as the charges contained in a second indictment charging similar offenses.

On August 15, 1984, the court sentenced defendant as a second felony offender to a term of imprisonment of one and one-half to three years.

The Appeals

The Appellate Division, Second Judicial Department, affirmed the judgment of conviction in an opinion dated August 19, 1985. The Appellate Division, which has factfinding power, N.Y. Crim. Proc. Law § 470.15(1), rejected defendant's claim that the police were merely using the guise of an administrative inspection as a pretext to gather evidence of a crime. The Appellate Division held, rather, that the inspection of defendant's junkyard was properly conducted for administrative purposes in accordance with the provisions of the New York State Vehicle and Traffic Law and the New York City Charter. The court rejected defendant's claim that VTL § 415-a violates the fourth amendment, and upheld the constitutionality of both that statute and New York City Charter § 436. 112 A.D.2d 1046, 493 N.Y.S.2d 34 (Pet. App., pp. 9a-10a).

---

2 The Penal Law section under which defendant was convicted provided:

> A person is guilty of criminal possession of stolen property in the second degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof, and when:
>
> . . . .
>
> 3. He is a pawnbroker or is in the business of buying, selling or otherwise dealing in property . . . .

N.Y. Penal Law § 165.45 (McKinney 1975).

The New York Court of Appeals, in an opinion dated May 8, 1986, reversed the order of the Appellate Division and held that both VTL § 415-a(5) and New York City Charter § 436 violate the fourth amendment of the United States Constitution. The Court of Appeals held that these statutes authorize searches "undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme," 67 N.Y.2d at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705 (Pet. App., p. 7a) and are for that reason unconstitutional. The court noted that the licensing and record-keeping requirements of VTL § 415-a did suggest an administrative scheme, and held, moreover, that the legislature could properly authorize unannounced warrantless inspections of required books and records. *Id.* at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705 (Pet. App., p. 8a). The Court of Appeals nevertheless concluded that VTL § 415-a(5)(a) violates the fourth amendment because it permits searches of vehicles and vehicle parts "notwithstanding the absence of any records against which the findings of such a search could be compared," *id.* at 344-45, 493 N.E.2d at 930, 502 N.Y.S.2d at 706 (Pet. App., p. 8a), and because it authorizes searches by police officers as well as by other regulatory agents, *id.* at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705 (Pet. App., p. 7a). The Court of Appeals therefore granted defendant's motion to suppress physical evidence, vacated his guilty plea, dismissed the counts of the indictment charging criminal possession of stolen property, and remitted the case to the trial court for further proceedings. 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (Pet. App., pp. 1a-8a).

This Court granted the State's petition for a writ of certiorari to the New York Court of Appeals by an order entered on October 6, 1986.

Defendant remains at liberty on $2,500 bail in this case pursuant to an order of the Chief Judge of the New York Court of Appeals dated October 16, 1985. 66 N.Y.2d 761, 488 N.E.2d 121, 497 N.Y.S.2d 1035. That order continued the bail set by the Supreme Court, Kings County, by an order dated

August 15, 1984, which granted defendant's motion pursuant to N.Y. Crim. Proc. Law § 460.50 for a stay of execution of the judgment pending determination of his appeal to the Appellate Division. Four days before this Court granted the petition for certiorari, defendant was arrested on new charges of criminal possession of stolen property and related charges, arising out of events in September of 1986. He is at liberty on $1000 bail in that case.

SUMMARY OF ARGUMENT

The statutes at issue in this case authorize warrantless inspections of automobile junkyards under circumstances that fall squarely within a well-established exception to the warrant requirement of the fourth amendment. Vehicle dismantling and dealing in secondhand goods constitute pervasively regulated industries with a long history of regulation, and persons who engage in those businesses therefore have the reduced expectation of privacy that is a prerequisite to a valid warrantless inspection scheme. Like dealers in alcoholic beverages, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), or firearms, *United States v. Biswell*, 406 U.S. 311 (1972), dealers in parts from dismantled vehicles may be licensed by the State, and as a condition of that license they may be required to keep detailed records of their inventory and to submit to periodic warrantless inspections of both their records and their inventory. Indeed, the dealer in this case had only the most limited expectation of privacy in his premises, because they consisted of an open yard without any buildings, visible through the chain link gate in the fence that surrounded the yard.

The statutes at issue here were enacted as part of a regulatory scheme designed to limit the sale of stolen automobiles and other property, to assist in the tracing of stolen property, and to prevent vehicle dismantlers and dealers in secondhand goods from facilitating the sale of stolen property. Like the statutes in *Colonnade* and *Biswell*, the scheme contains licensing requirements, record-keeping requirements, and civil penal-

ties for failure to comply. It is enforced by frequent and unannounced warrantless inspections, which are necessary for effective enforcement because of the ease with which violations can be concealed. *Compare Donovan v. Dewey*, 452 U.S. 594, 602-03 (1981), *and United States v. Biswell*, 406 U.S. at 316, *with Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316-20 (1978).

In the absence of a warrant requirement, an administrative inspection scheme must provide statutory standards for enforcement that substitute for a warrant in protecting the privacy of persons subject to inspection. *Donovan v. Dewey*, 452 U.S. at 600, 604-05. The statutes at issue here limit the time, place, scope, and purpose of administrative inspections, thereby guiding the discretion of the enforcement officers and providing an adequate substitute for a warrant.

As the courts below found, the inspection in this case was made pursuant to the statutory scheme, and not on the basis of any information or suspicion that it would uncover evidence of crime. While the Court of Appeals recognized this fact, it concluded that the administrative inspection scheme as a whole does not promote an administrative purpose but rather authorizes what is in reality a search for evidence of crime. In reaching this conclusion the Court of Appeals placed great weight on three factors: first, the inspections are carried out by police officers rather than regulatory agents; second, the statutes authorize inspection of inventory even when the business has failed to keep records with which to compare the inventory; and third, the inspections are conducted to discover stolen property, possession of which may be a crime.

None of these factors converts a valid administrative inspection scheme into a search for criminal evidence requiring probable cause and a warrant. Administrative inspections are not the exclusive province of any particular type of officer, nor are administrative inspections of inventory exclusively for the purpose of comparing inventory to records. To the contrary, inventory inspections may also be designed to determine whether a licensee is storing inventory properly, *Colonnade*

Catering Corp. v. United States, 397 U.S. 72 (1970), or whether a licensee is dealing in property that falls outside the terms of the license and is thereby committing a crime, *United States v. Biswell*, 406 U.S. 311 (1972). These are valid administrative concerns, like the concern in this case to prevent vehicle dismantlers and dealers in secondhand goods from dealing in stolen property. The fact that a violation of the regulatory scheme may also be a crime does not invalidate the scheme. It merely requires a hearing court to determine whether any particular inspection was conducted to further the regulatory objective, or whether instead it was solely a search for evidence of crime, for which a warrant and probable cause are required. As there is no dispute on this record that the inspection was conducted to enforce the statutory scheme and not on any suspicion of crime, the inspection and the statutes authorizing it satisfy constitutional standards, and the decision below should be reversed.

ARGUMENT

The inspection in this case falls squarely within a well-established exception to the rule first announced in *See v. City of Seattle*, 387 U.S. 541 (1967), that an administrative inspection of commercial premises ordinarily requires a warrant in order to be reasonable under the fourth amendment. This Court has made clear that warrantless inspections are permitted when three conditions are satisfied.

First, the industry subjected to the warrantless inspection scheme must be one whose members have a reduced expectation of privacy as a result of pervasive regulation, which may include licensing and record-keeping requirements, and civil penalties for noncompliance. Thus this Court has approved warrantless inspections of the records and inventory of dealers in liquor, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970), and firearms, *United States v. Biswell*, 406 U.S. 311, 316 (1972), and warrantless inspections of health and safety conditions in the mining industry, *Donovan v. Dewey*,

452 U.S. 594, 598-600 (1981). By contrast, it has held unconstitutional warrantless inspections of health and safety conditions in all businesses in interstate commerce. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-15 (1978).

Second, the warrantless inspections must be part of a regulatory scheme that is designed to further a strong state interest, and there must be support for the legislative judgment that warrantless inspections are necessary to accomplish the state objective. Thus, this Court has found that the evils associated with the firearms and liquor trades are sufficient to require comprehensive regulation, and that warrantless inspections are necessary to ensure compliance with the regulation of these industries, *United States v. Biswell*, 406 U.S. at 315-16; *Colonnade Catering Corp. v. United States*, 397 U.S. at 76; while warrantless inspections are not necessary to enforce health and safety regulations in all workplaces in interstate commerce. *Marshall v. Barlow's, Inc.*, 436 U.S. at 316-20.

Third, a valid warrantless inspection scheme must limit the time, place, and scope of inspections, and thereby provide an adequate substitute for a warrant in protecting the privacy of proprietors in the regulated businesses. *Donovan v. Dewey*, 452 U.S. at 603; *Marshall v. Barlow's, Inc.*, 436 U.S. at 321. Thus, this Court has found sufficient safeguards in the Federal Gun Control Act of 1968 (18 U.S.C. § 921 *et seq.*), *United States v. Biswell*, 406 U.S. at 315-16, and the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 801 *et seq.*, 811, 813(a)), *Donovan v. Dewey*, 452 U.S. at 603-05; but not in the Occupational Safety and Health Act of 1970 (29 U.S.C. § 657), *Marshall v. Barlow's, Inc.*, 436 U.S. at 322-24.

The statutes at issue in this case plainly satisfy all three requirements of a valid warrantless administrative inspection scheme.[3] The New York Court of Appeals erroneously held

---

3 The inspection of defendant's junkyard was independently authorized by both a state statute, VTL § 415-a, and a local ordinance, City Charter § 436. Thus if either one passes constitutional muster, the search must be upheld and the decision below reversed.

that the statutes do not fall within the exception to the warrant requirement because "in reality" they authorize searches for criminal evidence rather than inspections to enforce a regulatory scheme. In support of its conclusion the court pointed to three facts: the statutes authorize police officers rather than administrative agents to conduct the inspections; the statutes authorize searches of inventory in the absence of records against which to compare the inventory; and the statutes authorize searches for stolen property, possession of which constitutes not merely a regulatory violation but also a crime. Contrary to the view of the court below, none of these facts undermines the administrative character of the search.

Point I of this brief argues that vehicle dismantlers and dealers in secondhand goods are pervasively regulated and have the reduced expectation of privacy that is a prerequisite for a valid warrantless inspection scheme. Point II argues that the statutes at issue in this case create a valid regulatory scheme that promotes a strong state interest, and that warrantless inspections are necessary for the effective enforcement of that scheme. Point III argues that the statutes at issue here provide an adequate substitute for a warrant by limiting the time, place, and scope of inspections. Point IV argues that the administrative character of these warrantless inspections is not defeated by the fact that they are conducted by police officers, that they extend to inventory not described in records, and that they are designed to uncover regulatory violations which may also constitute crimes or evidence of crime.

I. VEHICLE DISMANTLERS AND DEALERS IN SECONDHAND GOODS IN NEW YORK ARE ENGAGED IN A PERVASIVELY REGULATED INDUSTRY, AND THEREFORE HAVE THE REDUCED EXPECTATION OF PRIVACY THAT IS A PREREQUISITE TO A VALID WARRANTLESS INSPECTION SCHEME.

The defendant in this case had little legitimate expectation of privacy in his junkyard. First, the expectation of privacy in commercial premises falls far short of that in residential premises. *Donovan v. Dewey*, 452 U.S. at 598-99; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *See v. City of Seattle*, 387 U.S. 541, 546 (1967); *cf. Payton v. New York*, 445 U.S. 573 (1980) (paramount fourth amendment privacy interest is in person's home).

Second, defendant's reasonable expectation of privacy in his junkyard was further curtailed by the pervasive regulation of vehicle dismantlers. Extensive governmental regulation and supervision of an industry effectively give notice to proprietors in that industry that they cannot reasonably expect to be accorded the same privacy in their business premises that people involved in other, less-regulated industries enjoy in their business premises. It should hardly surprise those who choose to become firearms dealers, for example, that they will be subjected in their business affairs to more frequent and more intrusive contact with the government, including warrantless inspections, than if they had entered a field in which the government did not have such obvious regulatory interests. *United States v. Biswell*, 406 U.S. at 316. Pervasive regulation of a business thus diminishes the reasonable expectation of privacy of a person engaged in that business. *Donovan v. Dewey*, 452 U.S. at 603-04, 606 (mining industry); *United States v. Biswell*, 406 U.S. at 316 (firearms industry); *Colonnade Catering Corp. v. United States*, 397 U.S. at 77 (liquor industry); *see California v. Carney*, 471 U.S. 386, 392 (1985) ("pervasive schemes of regulation [of vehicles] necessarily lead to reduced expectations of privacy").

Vehicle dismantlers, moreover, are pervasively regulated in New York. Because a vehicle dismantling business involves both acquiring motor vehicles and dismantling them for parts or reselling them as scrap, VTL § 415-a(1), a vehicle dismantling business constitutes a part of the motor vehicle industry, the secondhand goods industry, and the junk industry. *See People v. Cusumano*, 108 A.D.2d 752, 754, 484 N.Y.S.2d 909, 912 (2d Dep't 1985) (junkyard owner was "junkshop keeper" within meaning of New York City Charter § 436); *People v. Tinneny*, 99 Misc.2d 962, 969, 417 N.Y.S.2d 840, 845 (Sup. Ct. 1979) (vehicle dismantlers are part of junk and automobile industries); New York City Admin. Code, ch. 32, tit. B, art. 18, § B32-113.0 (defining "junk dealer" and "junk shop"); *id.* at art. 19, § B32-126.0 (defining "dealer in second-hand articles"). The motor vehicle, secondhand goods, and junk industries are each subject to pervasive governmental regulation in New York, including statutory licensing and record-keeping requirements.[4]

The regulatory schemes now in effect in these industries are, in and of themselves, sufficiently pervasive to diminish a vehicle dismantler's legitimate expectation of privacy. In addition, the long history of regulation in New York of the motor vehicle, secondhand goods, and junk industries further establishes that they are pervasively regulated, and thus have a reduced expectation of privacy. *See Picone v. Commissioner of Licenses*, 241 N.Y. 157, 149 N.E. 336 (1925) (involving regulation by New York City of junk dealers); *People v. Tinneny*, 99 Misc.2d at 969 & n.2, 417 N.Y.S.2d at 845 & n.2 (citing local

4 *See* VTL §§ 415-418 (regulating motor vehicle manufacturers, dealers, repairmen, and dismantlers); N.Y. Comp. Codes R. & Regs. tit. 15, Part 81 (1981) (regulating vehicle dismantlers and other persons engaged in transfer and disposal of junk and salvage vehicles); N.Y. Gen. Bus. Law §§ 60-64 (regulating junk dealers); New York City Charter § 436 (authorizing supervision of junkshop keepers and dealers in secondhand merchandise); New York City Admin. Code, ch. 32, tit. B, art. 18 (regulating junk dealers); *id.* at art. 19 (regulating dealers in secondhand articles). *See generally* N.Y. Town Law § 136(1) (authorizing enactment of local ordinances for licensing and otherwise regulating junk dealers and dealers in secondhand articles).

and city ordinances regulating junk shops for over 140 years); Wise, *The History of the Vehicle and Traffic Law*, McKinney's Cons. Laws of New York, Book 62A, XI, XIII-XIV (1970) (tracing to 1910 statute regulating motor vehicle dealers and manufacturers).

This long history of regulation even more clearly gives notice to those who engage in business as vehicle dismantlers that they cannot reasonably expect the same privacy in their commercial affairs that they would enjoy if they had engaged in other, less-regulated businesses.[5] *See Marshall v. Barlow's, Inc.*, 436 U.S. at 313. Indeed, because the business of vehicle dismantlers is part of three industries that New York has closely regulated as a result of their common susceptibility to trafficking in stolen property, it would be particularly unreasonable for vehicle dismantlers to expect the same privacy accorded to proprietors of less-regulated businesses.

Moreover, New York's statutes are not unusual. Pervasive regulation of defendant's business can be found nationwide. Vehicle dismantlers are subject to extensive regulation and warrantless inspections in at least thirty-three other states,[6] and

5 While a long history of regulation is not a constitutional prerequisite to conducting warrantless administrative inspections in a particular industry, it is a persuasive factor tending to show a reduced expectation of privacy on the part of persons who enter the regulated industry. *Donovan v. Dewey*, 452 U.S. at 605-06.

6 Ariz. Rev. Stat. Ann. § 28-1307(c) (Supp. 1986); Cal. Veh. Code §§ 320(b), 2805 (West Supp. 1986); Conn. Gen. Stat. Ann. § 14-67m(a) (West Supp. 1986); Fla. Stat. Ann. § 812.055 (West Supp. 1986); Ga. Code Ann. § 84-7716 (Harrison 1985); Ill. Ann. Stat. ch. 95 1/2, para. 5-403 (Smith-Hurd Supp. 1986); Ind. Code Ann. §§ 9-1-3.6-10, -12 (1976 & Supp. 1981); Iowa Code Ann. §§ 321.90(3)(b), 321.95 (West 1985); Kan. Stat. Ann. § 8-2408(c) (1982); Ky. Rev. Stat. Ann. § 177.935(a) (Michie/Bobbs-Merrill 1980); La. Rev. Stat. Ann. § 32:757 (West Supp. 1986); Me. Rev. Stat. Ann. tit. 29, § 2459(3) (Supp. 1986); Mich Comp. Laws Ann. §§ 257.13, .251 (West 1977 & Supp. 1986); Miss. Code Ann. § 27-19-313 (1972); Mo. Ann. Stat. § 301-225(2) (Vernon 1987); Mont. Code Ann. § 75-10-503 (1985); Nev. Rev. Stat. § 47.170 (1957); N.H. Rev. Stat. Ann. § 261:132 (1982); N.M. Stat. Ann. § 66-2-12 (1978); Okla. Stat. Ann. tit. 47, § 591.6 (West Supp. 1987); Or. Rev. Stat. § 810.480(2) (1985); R.I.

those statutes have been upheld in most states where the issue has been litigated.[7] Similarly, dealers in secondhand goods are subject to extensive regulation and warrantless inspections in at least seventeen other states and the District of Columbia,[8] and these statutes, too, have consistently been upheld against constitutional attack.[9]

Gen. Laws § 42-14.2-15 (1956 & Supp. 1984); S.C. Code Ann. § 56-5-5670 (Law. Co-op. 1976); S.D. Codified Laws Ann. § 32-6B-39, -40 (Supp. 1986); Tenn. Code Ann. § 55-14-106 (1980); Tex. Rev. Civ. Stat. Ann. art. 6687-2 (Vernon 1986); Utah Code Ann. § 41-3-23 (1953); Vt. Stat. Ann. tit. 23, § 466 (1978); Va. Code Ann. § 46.1-550.12 (1950); Wash. Rev. Code Ann. § 46.79.090 (1987); W. Va. Code § 17A-6-25 (1986); Wis. Stat. Ann. § 218.22 (West 1957); Wyo. Stat. § 31-13-112(e)(iii) (1984).

7 The cases upholding the statutes follow, with discussions of the pervasive regulation of the vehicle dismantling industry at the pages noted. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1079 (7th Cir. 1983); *People v. Easley*, 90 Cal. App.3d 440, 445-46, 153 Cal. Rptr. 396, 399 (Ct. App.), *cert. denied*, 444 U.S. 899 (1979); *Moore v. State*, 442 So.2d 215, 216 (Fla. 1983); *People v. Barnes*, 146 Mich. App. 37, 41-42, 379 N.W.2d 464, 466 (Ct. App. 1985); *see also State v. Tindell*, 272 Ind. 479, 483, 399 N.E.2d 746, 748 (1980) (motor vehicle manufacturers or dealers); *Shirley v. Commonwealth*, 218 Va. 49, 51-52, 57, 235 S.E.2d 432, 433, 436 (1977) (garages or repair shops). *But see People v. Krull*, 107 Ill.2d 107, 481 N.E.2d 703 (1985), *cert. granted*, 106 S. Ct. 1456 (1986); *State v. Galio*, 92 N.M. 266, 587 P.2d 44 (1978).

8 Ark. Stat. Ann. § 71-1501.1 (1979); Colo. Rev. Stat. §§ 18-13-114(1), -117(1) (1986); Del. Code Ann. tit. 24, §§ 2314, 2315 (1981); D.C. Code Ann. § 4-148 (1981); La. Rev. Stat. Ann. 37:1865 (West 1974 & Supp. 1986); Md. Ann. Code art. 56, § 235 (1957); Minn. Stat. Ann. § 609.815 (West Supp. 1977); Mont. Code Ann. § 7-21-4207 (1985); Neb. Rev. Stat. § 69-204 (1981); Nev. Rev. Stat. §§ 647.030, .040 (1957); N.M. Stat Ann. § 57-7-2 (1978); Ohio Rev. Code Ann. § 4737.01 (Anderson 1977 & Supp. 1985); Okla. Stat. Ann. tit. 21, § 1041 (West 1983); Pa. Stat. Ann. tit. 53, § 4432 (Purdon 1972); S.C. Code Ann. § 40-27-10 (Law. Co-op. 1976); Tex. Rev. Civ. Stat. Ann. art. 5069-51.08 (Vernon Supp. 1986); Utah Code Ann. § 76-10-907 (1953); Va. Code Ann. § 54-834 (1950).

9 The cases upholding the statutes follow, with discussions of the pervasive regulation of the secondhand goods industry at the pages noted. *State v. Barnett*, 389 So.2d 352, 356 (La. 1980); *State v. Norman*, 2 Ohio App.3d 159, 165, 441 N.E.2d 292, 299 (Ct. App. 1981); *Kipperman v. State*, 626 S.W.2d 507, 510 (Tex. Crim. App. 1981); *see also Peterman v. Coleman*, 764 F.2d 1416 (11th Cir. 1985) (county ordinance); *State v. Wybierala*, 305 Minn. 455, 459, 235 N.W.2d 197, 199-200 (1975) (city ordinance).

Neither defendant nor the New York Court of Appeals denies that the regulation of vehicle dismantlers is sufficiently pervasive to allow a scheme of warrantless inspections. Defendant has consistently conceded that "a carefully tailored statute" authorizing warrantless inspections of junkyards "would pass constitutional muster." Respondent's Brief in Opposition to Petition for Writ of Certiorari at 3. Likewise the New York Court of Appeals, while objecting to various features of VTL § 415-a and Charter § 436, noted that the legislature could properly require vehicle dismantlers to keep detailed books and records, and authorize warrantless inspections of those books and records. 67 N.Y.2d at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705 (Pet. App., p. 8a).

Third, defendant's reasonable expectation of privacy in his junkyard was further diminished because his business premises was nothing more than a bare lot strewn with vehicles and vehicle parts. There were no buildings in the junkyard (Vega: 5, 54-55),[10] and the interior of the yard was readily visible from outside it (Vega: 52-53). Defendant could not reasonably expect much privacy in property that he kept in an exposed lot, and that was largely open to public view.[11] *See Dow Chemical Co.*

---

10 Numbers in parentheses refer to pages of the transcript of the hearing on defendant's motion to suppress physical evidence. The numbers are preceded by the name of the witness whose testimony is cited.

11 Indeed, defendant's voluntary consent to the inspection suggests that his actual expectation of privacy in the junkyard was minimal. Defendant never objected to the inspection or otherwise offered any resistance to the police. Rather, he told them to "[g]o right ahead" when they announced that they were going to inspect the yard (Vega: 6, 28, 47). This consent, moreover, was voluntary. *See United States v. Watson*, 423 U.S. 411, 424-25 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Defendant was not physically restrained, nor had he yet been informed that he was under arrest, when he told the officers to go ahead with the inspection. In addition, because defendant had

v. United States, 106 S. Ct. 1819, 1825 (1986) (contrasting business's "reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings" with lack of constitutionally protected privacy interest invaded by aerial surveillance of open areas of premises); *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978) (privacy protected by fourth amendment "may be sheltered by the walls of a warehouse or other commercial establishment not open to the public" [citations omitted]); *United States v. Santana*, 427 U.S. 38, 42 (1976) (person standing in doorway of dwelling, where she was fully exposed to public view, had no expectation of privacy protected by fourth amendment); *Donovan v. Dewey*, 452 U.S. at 609 (Rehnquist, J., concurring) (fourth amendment protection did not extend to stone quarry that was "largely visible to the naked eye without entrance onto the company's property"); *cf. Oliver v. United States*, 466 U.S. 170, 181 (1984) ("an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers"); *Marshall v. Barlow's, Inc.*, 436 U.S. at 315 ("[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well" [citation omitted]).

II. THE WARRANTLESS INSPECTIONS AUTHORIZED BY THE STATUTES AT ISSUE ARE NECESSARY TO FURTHER THE SUBSTANTIAL STATE INTEREST IN CONTROLLING THEFT OF MOTOR VEHICLES AND OTHER PROPERTY.

The State has a substantial interest in controlling the epidemic of motor vehicle theft and in regulating industries uniquely associated with that problem. The magnitude of the problem of motor vehicle theft in New York is documented by

been in the scrap business for five years and had two prior criminal convictions, his consent was likely a calculated choice. Finally, while refusal to permit an inspection is an offense under both statutes, there is no evidence that defendant even knew this (Vega: 32; Burger: 60-61). Therefore, defendant's consent to the inspection confirms that he in fact had little expectation of privacy in his junkyard.

the Governor's memorandum approving an amendment in 1979 to VTL § 415-a:[12]

> Motor vehicle theft in New York State has been rapidly increasing. It has become a multimillion dollar industry which has resulted in an intolerable economic burden on the citizens of New York. In 1976, over 130,000 automobiles were reported stolen in New York, resulting in losses in excess of $225 million. Because of the high rate of motor vehicle theft, the premiums for comprehensive motor vehicle insurance in New York are significantly above the national average. In addition, stolen automobiles are often used in the commission of other crimes and there is a high incidence of accidents resulting in property damage and bodily injury involving stolen automobiles.

Governor's Memorandum approving L. 1979, chs. 691, 692, 1979 N.Y. Laws 1826, 1826-27. Moreover, motor vehicle theft is a nationwide problem, whose scope is evinced by the number of states that have enacted statutes authorizing warrantless inspections of vehicle dismantling businesses, junkyards, and other businesses involving motor vehicles, and by the judicial decisions upholding those statutes.[13]

12 That amendment added, *inter alia*, express authority for an agent of the Commissioner of Motor Vehicles or a police officer to examine the vehicles and vehicle parts that are subject to the record keeping requirements of the statute, as well as to examine the records themselves. *See* Act of July 13, 1979, ch. 691, § 2, 1979 N.Y. Laws 1336, 1338-39.

13 The statutes are collected at note 6 *supra*. The decisions upholding them, collected at note 7 *supra*, discuss the strong public interest in controlling auto theft and the sale of stolen auto parts at the pages noted below. *See Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d at 1077 (Ill.); *People v. Easley*, 90 Cal. App.3d at 445, 153 Cal. Rptr. at 399; *Moore v. State*, 442 So.2d at 216 (Fla.); *State v. Tindell*, 272 Ind. at 482-83, 399 N.E.2d at 747-48; *People v. Barnes*, 146 Mich. App. at 42, 379 N.W.2d at 466; *Shirley v. Commonwealth*, 218 Va. at 52, 235 S.E.2d at 434; *see also People v. Krull*, 107 Ill.2d at 116, 481 N.E.2d at 707 (concluding that warrantless administrative searches of junkyards

The State likewise has a substantial interest in controlling theft of property other than motor vehicles, and in regulating junk dealers and secondhand merchandise dealers to prevent them from trafficking in stolen goods. For this reason, many states regulate pawnbrokers, junk dealers, and dealers in secondhand goods, and authorize warrantless inspections of their premises. These statutes have uniformly been upheld against constitutional challenge.[14] This broad legislative and judicial consensus further confirms the reasonableness of New York's administrative inspection scheme. *See United States v. Watson*, 423 U.S. 411, 421-24 (1976) (citing national consensus that warrantless public arrests on probable cause are permissible, and concluding that practice is consistent with fourth amendment).

Moreover, without frequent and unannounced inspections, it would be virtually impossible to prevent vehicle dismantlers from trafficking in stolen vehicles and parts. The statutory scheme of warrantless inspections is designed to deter dismantlers from trafficking in stolen property and to facilitate removal from the industry, through license revocation or suspension, of dismantlers who engage in that activity despite the deterrent effect of the inspections. Because a dismantler's possession of stolen property is a circumstance that may

---

are necessary to further adequately the "strong public interest" in preventing theft of automobiles and trafficking in stolen automotive parts, but invalidating statute because it did not adequately limit time, place, and scope of searches). *But see State v. Galio*, 92 N.M. 266, 587 P.2d 44 (1978) (invalidating statute authorizing warrantless inspections of motor vehicle repair shops and related businesses, because legislative policy statement did not show urgent government interest furthered by statute).

14 The statutes are collected at note 8 *supra*. The decisions upholding them, collected at note 9 *supra*, discuss at the pages noted below the strong public interest in preventing secondhand goods dealers from becoming conduits for stolen property. *Peterman v. Coleman*, 764 F.2d at 1416 (county ordinance); *State v. Barnett*, 389 So.2d at 356 (La.); *State v. Wybierala*, 305 Minn. at 459-60, 235 N.W.2d at 199-200 (city ordinance); *State v. Norman*, 2 Ohio App.3d at 165, 441 N.E.2d at 299; *Kipperman v. State*, 626 S.W.2d at 511 (Tex. Crim. App.).

change from day to day, the inspections are most effective if they are conducted frequently. Similarly, because a dismantler can easily rid the premises of any stolen property in anticipation of a particular inspection, the inspections must be unannounced if they are to serve their purpose at all. In light of the need that the inspections be frequent and unannounced, a warrant requirement would simply impede inspections without providing any protection beyond that afforded by a properly limited statute.

Thus this Court in *Donovan v. Dewey*, 452 U.S. at 602-03, upheld a statute authorizing warrantless inspections of mines, because many mine safety or health hazards could be easily concealed if advance warning of inspection were obtained. Similarly, *United States v. Biswell*, 406 U.S. at 316, upheld a statute authorizing warrantless inspections of firearms dealers, because they could easily conceal or correct violations on short notice. Indeed, the Seventh Circuit Court of Appeals, in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1077-78 (7th Cir. 1983), upheld a statute authorizing warrantless inspections of automobile junkyards and related businesses, because such inspections appear critical to the State's need for frequent, impromptu inspections.

Defendant does not dispute the proposition that effective regulation of the vehicle dismantling industry requires a warrantless inspection scheme. Both in the court below and in his response to the petition for certiorari in this Court he has consistently argued only that the statutes at issue here are not sufficiently tailored to the administrative purpose, conceding that a more detailed warrantless inspection statute, such as the one upheld in *Bionic Auto Parts and Sales, Inc. v. Fahner*, would pass constitutional muster. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 3.

Likewise the court below acknowledged that a warrantless inspection scheme would be justified by the State's interest in controlling motor vehicle theft. That court objected to the provisions for warrantless inspections of inventory, but noted

that the Constitution would permit warrantless inspections of required books and records. 67 N.Y.2d at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705 (Pet. App., p. 8a).

III. THE STATUTES LIMIT THE TIME, PLACE, AND SCOPE OF WARRANTLESS ADMINISTRATIVE INSPECTIONS, THEREBY PROVIDING AN ADEQUATE SUBSTITUTE FOR A WARRANT.

Defendant's limited expectation of privacy in his junkyard was adequately protected by the statutes that authorized the warrantless inspection. These statutes provide an adequate substitute for a warrant, and thus are constitutional, because the inspections they authorize are "carefully limited in time, place, and scope." *United States v. Biswell*, 406 U.S. at 315.

First, both statutes limit the time of inspections to regular business hours. VTL § 415-a permits inspections only during a vehicle dismantler's "regular and usual business hours." VTL § 415-a(5)(a). While New York City Charter § 436 does not contain its own time limitation on authority to inspect junkshop keepers and dealers in secondhand merchandise, the New York City Administrative Code limits that authority to inspections conducted at "reasonable times," which can fairly be read as regular business hours. New York City Admin. Code, ch. 32, tit. B, art. 18, § B-32-123.0; *id.* at art. 19, § B32-132.0(d); *see People v. Pace*, 111 Misc.2d 488, 491, 444 N.Y.S.2d 529, 531 (Sup. Ct. 1981), *rev'd on other grounds*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985).[15] *See generally St.*

15 The trial court in *People v. Pace* held that provisions of the New York City Administrative Code limit the inspections authorized by Charter § 436 to those conducted at "reasonable times." 111 Misc.2d at 491, 444 N.Y.S.2d at 531. While the New York Court of Appeals in this case held Charter § 436 unconstitutional, it did not rest its decision on any contrary construction of the statute. Therefore, in the absence of any judicial decisions construing Charter § 436 differently, this Court should accept this limiting construction of the statute. *See Kolender v. Lawson*, 461 U.S. 352, 355 & n.4 (1983) (where State Supreme Court had not interpreted state statute, construction of

Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981) (statute should be construed, if such construction is fairly possible, to avoid raising doubts as to its constitutionality); *Eaton v. New York City Conciliation and Appeals Board*, 56 N.Y.2d 340, 346, 437 N.E.2d 1115, 1117, 452 N.Y.S.2d 358, 360 (1982) (statute should be interpreted in such manner as to uphold its constitutionality). It is undisputed, moreover, that defendant's junkyard was open for business when the officers arrived to conduct the inspection at 12:00 noon (Burger: 55-56, 75). Each of the statutes that authorized the inspection of defendant's junkyard thus limited the time of the inspection in exactly the same manner as the statutes upheld in *United States v. Biswell*, 406 U.S. at 312 n.1, and *Bionic Auto Parts and Sales, Inc., v. Fahner*, 721 F.2d at 1080.

Second, both VTL § 415-a and Charter § 436 apply only to industries that are particularly susceptible to trafficking in stolen goods, so both statutes are sufficiently tailored to the goal of combatting that illegal activity. Indeed, VTL § 415-a specifically focuses only on the industry that consists of vehicle dismantlers and closely related businesses, and thus narrowly addresses the particularly pressing problem of motor vehicle theft.[16] Thus VTL § 415-a and Charter § 436 are more like the statute upheld in *Donovan v. Dewey*, 452 U.S. at 600-02, than the statute struck down in *Marshall v. Barlow's, Inc.*, 436 U.S. at 321. The *Dewey* statute, like the statutes at issue in this case, applied only to a single, pervasively regulated industry, while the *Barlow's* statute broadly applied to all businesses with employees in interstate commerce, and failed to tailor inspec-

statute by state intermediate appellate court determined meaning of statute for purpose of vagueness challenge in United States Supreme Court).

16 While New York City Charter § 436 applies to a somewhat broader set of businesses, it is nevertheless limited only to industries susceptible to trafficking in stolen goods. Charter § 436 is therefore adequately tailored to a substantial state goal.

tions to the particular concerns posed by the numerous and varied businesses regulated by the statute.

In addition, both statutes at issue in this case limit the place and the scope of inspections. VTL § 415-a confines inspections of vehicle dismantlers to the records required by the statute and to "any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises." VTL § 415-a(5)(a). New York City Charter § 436 limits inspections of junkshop keepers and dealers in secondhand merchandise to the proprietors, "their clerks and employees and their books, business premises, and any articles of merchandise in their possession." That language, fairly interpreted, authorizes inspections only of records and inventory at business premises, particularly in light of the requirement that a junk dealer keep a record of purchases and sales at the dealer's place of business, New York City Admin. Code, ch. 32, tit. B, art. 18, § B32-123.0. Each of the statutes that authorized the inspection of defendant's junkyard thus carefully limited the place and scope of that inspection in the same manner as the statute upheld in *United States v. Biswell*, 406 U.S. at 312 n.1 (inspections of records required by statute and firearms or ammunition on business premises). *See also United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 684-85 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974) (upholding statute authorizing warrantless inspection of records on pharmacist's premises, because Constitution permits "an inspection statutorily limited to the business records and goods of industries that are properly subject to intensive regulation in the public interest").

Indeed, the limitations on the time, place, and scope of inspections authorized by the statutes in this case essentially parallel the limitations contained in the warrantless inspection statute upheld by this Court in *United States v. Biswell*, 406 U.S. at 312 n.1. In that case the statute authorized warrantless inspection by a Treasury agent, during business hours, of required records and any firearms or ammunition kept at the premises of a firearms importer, manufacturer, dealer, or

collector. Similarly in this case the statutes authorize warrantless inspection by a police officer or agent of the Commissioner of Motor Vehicles, during regular business hours, of required records and inventory on the premises of a vehicle dismantler (VTL § 415-a) or dealer in secondhand merchandise (Charter § 436).[17]

---

17 The statutes upheld by the various state courts that have considered the question are similar in form. *See People v. Easley*, 90 Cal. App.2d at 443, 153 Cal. Rptr. at 398 (inspection [1] by "any peace officer" [2] "during business hours" [3] of "the premises, pertinent records, and vehicles" [4] of licensed automobile dismantler conducting more than one type of business at the establishment); *Moore v. State*, 442 So.2d at 215 (Fla.) (inspection [1] by "[a]ny law enforcement officer" [2] "during normal business hours" [3] "for the purpose of locating stolen vehicles, investigating the titling and registration of vehicles, inspecting vehicles wrecked or dismantled, or inspecting [required] records" [4] of junkyard, motor vehicle salvage yard, or other similar business); *State v. Tindell*, 272 Ind. at 480, 399 N.E.2d at 747 (inspection [1] by "any state police officer or authorized representative of the department" [2] "during reasonable business hours" [3] of "all certificates of origin, certificates of title or proper assignments thereof, and any or all motor vehicles, semitrailers, or recreational vehicles . . . which are held for resale" at place of business [4] of licensed motor vehicle manufacturer or dealer); *State v. Barnett*, 389 So.2d at 353 n.2, 354 (La.) (inspection [1] by "the superintendent of police or sheriff of the parish or anyone designated by them of the city, town or parish in which the secondhand dealer does business" [2] "at all times" [3] of required book containing record of purchase "and the various articles purchased and referred to therein" [4] of secondhand dealer); *People v. Barnes*, 146 Mich. App. at 40, 379 N.W.2d at 465 (inspection [1] by "a police officer or authorized officer or investigator of the secretary of state" [2] "during reasonable or established business hours" [3] of "the record and inventory" [4] of automobile salvage dealer); *State v. Wybierala*, 305 Minn. at 459, 235 N.W.2d at 199 (inspection [1] by "the pawnshop inspector, license inspector or officers of the police force of the City of St. Paul" [2] "at reasonable times" [3, 4] "for the purpose of inspecting such premises [where licensed junk and secondhand dealer is carrying on business] and inspecting the goods, wares and merchandise therein for the purpose of locating goods suspected or alleged to have been stolen or otherwise improperly disposed of"); *Shirley v. Commonwealth*, 218 Va. at 50, 235 S.E.2d at 432-33 (inspection [1] by "[a]ny peace officer or Division [of Motor Vehicles] officer or employee who shall be in uniform or shall exhibit a badge or other sign of authority" [2] without restriction as to time [3, 4] of "any motor vehicle, trailer or semitrailer in any public garage or repair

IV. THE ADMINISTRATIVE CHARACTER OF THIS WARRANTLESS INSPECTION SCHEME IS NOT DEFEATED BY THE FACT THAT INSPECTIONS ARE CONDUCTED BY POLICE OFFICERS, EXTEND TO INVENTORY NOT DESCRIBED IN REQUIRED RECORDS, AND ARE DESIGNED TO UNCOVER STOLEN PROPERTY, WHICH MAY CONSTITUTE EVIDENCE NOT ONLY OF A REGULATORY VIOLATION BUT ALSO OF A CRIME.

The New York Court of Appeals held that VTL § 415-a and Charter § 436 "in reality" authorize searches for evidence of crime, and not inspections to enforce a regulatory scheme. That conclusion is based on a fundamental misconception about the relationship between penal sanctions and administrative regulation. Contrary to the view of the court below, the State is entitled to use both penal sanctions and administrative regulation to attack a major social problem. When it does so, the result is that some evidence obtained pursuant to a valid administrative inspection is relevant to violations of both the penal law and administrative regulation.

New York has chosen to attack the problem of theft of motor vehicles and other property through both its penal law and administrative regulation. The New York Penal Law punishes theft, N.Y. Penal Law art. 155, and knowing possession of stolen property, N.Y. Penal Law §§ 165.40-165.54, no matter who engages in the prohibited conduct. The regulatory

---

shop, for the purpose of locating stolen motor vehicles, trailers and semitrailers and for investigating the title and registration of motor vehicles, trailers and semitrailers"). *But see People v. Krull*, 107 Ill.2d at 113, 481 N.E.2d at 706 (invalidating statute authorizing inspection [1] by "the Secretary of State or his authorized representative or any peace officer" [2] "at any reasonable time during the night or day" [3, 4] of required records of automotive parts dealers, scrap processors, and parts recyclers, and of "the premises of the licensee's established place of business for the purpose of determining the accuracy of required records").

schemes at issue here by contrast regulate only dealers in vehicle parts, VTL § 415-a, and in secondhand goods, Charter § 436, and penalize the failure to keep proper records of inventory as well as the inclusion of stolen property in that inventory.

A vehicle dismantler who illegally possesses stolen vehicles or parts is subject to a variety of administrative sanctions under the VTL. The Commissioner of Motor Vehicles may suspend, revoke, or decline to renew the dismantler's license to engage in the business, VTL § 415-a(6)(a), and may also impose civil financial penalties, VTL § 415-a(6)(b). These penalties may be imposed either after conviction or after an administrative hearing. VTL § 415-a(6)(a).

These administrative sanctions are at the heart of the legislative scheme. The legislative purpose in enacting VTL § 415-a was not to enforce the penal law, but rather to force automobile theft rings out of the junkyard business through a system of licensing requirements and inspections, and to make it possible to trace vehicles and parts passing through the junkyards that handle them through a system of required records.

As the New York State Department of Motor Vehicles explained, in its memorandum in support of the enactment of VTL § 415-a in 1973, the purpose of the registration requirement "is to provide a system of record keeping so that vehicles can be traced through junk yards and to assure that such junk yards are run by legitimate business men rather than by auto theft rings." Memorandum of State Dep't of Motor Vehicles in support of L. 1973, ch. 225, 1973 N.Y. Laws 2166, 2167.

Similarly, in a letter to the Governor's Counsel urging him to approve the bill, the Chairman of the State Senate Committee on Transportation wrote:

> This bill establishes much needed safeguards for an industry which can be readily infiltrated by those wishing to dispose of stolen automobiles or automobile parts.

> Although the bill imposes some additional duties on those legitimate dealers in the industry, protection is granted to them by the controls imposed on the source and ownership of the parts they acquire.

Letter of John D. Caemmerer, Chairman of State Senate Comm. on Transp., to Counsel to the Governor (Apr. 12, 1973), *reprinted in* Governor's Bill Jacket, L. 1973, ch. 225.

The administrative character of the statutory scheme was emphasized again at the time of the 1979 amendment, in a letter from the Deputy Commissioner of the State Department of Motor Vehicles to the Governor's Counsel urging him to approve the bill:

> This bill attempts to provide enforcement not only through means of law enforcement but by making it unprofitable for persons to operate in the stolen car field.
>
> The various businesses which are engaged in this operation have been studied and the control and requirements on the businesses have been written in a manner which would permit the persons engaged in the business to legally operate in a manner conducive to good business practices while making it extremely difficult for a person to profitably transfer a stolen vehicle or stolen part. The general scheme is to identify every person who may legitimately be involved in the operation and to provide a record keeping system which will enable junk vehicles and parts to be traced back to the last legitimately registered or titled owner. Legitimate businessmen engaged in this field have complained with good cause that the lack of comprehensive coverage of the field has put them at a disadvantage with persons who currently are able to operate outside of statute and regulations. They have also legitimately complained that delays inherent in the present statutory

> regulation and onerous record keeping requirements have made profitable operation difficult.
>
> The provisions of this bill have been drafted after consultation with respected members of the various industries and provides a more feasible system of controlling traffic in stolen vehicles and parts.

Letter of Stanley M. Gruss, Deputy Comm'r & Counsel to State Dep't of Motor Vehicles, to Counsel to the Governor (June 20, 1979), *reprinted in* Governor's Bill Jacket, L. 1979, ch. 691.

Thus it is clear that the purpose of the statute is not to enforce the penal law but rather to force out of the industry those persons who deal in stolen vehicles or parts. A vehicle dismantler like defendant, who is in possession of stolen property, violates both the administrative scheme and the penal law. That fact does not invalidate the administrative scheme, or the warrantless inspection designed to enforce it.

This Court recognized as much in *United States v. Biswell*, 406 U.S. 311 (1972), which upheld a warrantless inspection of a dealer's inventory aimed at determining whether he was dealing in firearms outside the scope of his license.[18] The firearms found on the dealer's premises constituted evidence of various regulatory violations, and because those violations were criminally punishable, the firearms also constituted evidence of the crimes for which he was prosecuted.[19]

---

18 This result was foreshadowed in *See v. City of Seattle*, 387 U.S. 541, 547 (1967), when the Court noted that the Constitution would permit warrantless inspections incidental to "such accepted regulatory techniques as licensing programs." The ALI Model Code of Pre-Arraignment Procedure likewise notes that warrantless inspections are appropriate in the regulation of licensed businesses. *See* Model Code of Pre-Arraignment Procedure § SS 250.5(1) (1975).

19 As this Court noted in *Camara v. Municipal Court*, 387 U.S. 523, 531 (1967), most regulatory laws are enforced by criminal processes, and therefore evidence of a regulatory violation is ordinarily also evidence of crime. *See also In re Grand Jury Subpoena Duces Tecum*, 781 F.2d 64, 67-68 (6th Cir.), *cert. denied*, 107 S. Ct. 64 (1986)

The same can be said of each of the other warrantless administrative inspection schemes upheld by this Court. In *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), this Court indicated that the Constitution would permit a warrantless inspection of a caterer's locked liquor storeroom, for the purpose of determining whether liquor bottles were being improperly refilled. The administrative character of the inspection was not defeated by the fact that such refilled liquor bottles constitute evidence not only of regulatory violations but also of crimes, *see* 26 U.S.C. §§ 5301(c), 5606. Likewise, the mine inspections upheld in *Donovan v. Dewey*, 452 U.S. 594 (1981), were designed to discover health and safety violations subject to criminal as well as civil sanctions, *see* 30 U.S.C. § 820(d).

So too here the inspection was designed to discover evidence with both administrative and penal law significance. The inspection was designed to discover stolen property on the premises of a licensed vehicle dismantler. Such property is relevant to enforcement of not only the penal law but also the administrative regulation of the vehicle dismantling industry.

The court below took the view that the penal law displaced the administrative regulatory scheme as a matter of constitutional law, but that is simply incorrect. In the view of the court below, a valid administrative scheme could authorize warrantless inspection of books and records, and inspection of inventory for the limited purpose of comparing it with records, but the scheme ceases to be administrative when it authorizes inspection of inventory in the absence of records. 67 N.Y.2d at

(although record-keeping requirement of Motor Vehicle Information and Cost Savings Act facilitated discovery of criminal evidence and thereby facilitated criminal prosecutions for violations of Act, overall purpose of Act was regulatory); *United States v. Gel Spice Co.*, 773 F.2d 427, 432 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 804 (1986) (although evidence gathered during warrantless inspection of defendant's commercial establishment pursuant to Federal Food, Drug, and Cosmetic Act was used in criminal prosecution of defendant for violations of Act, inspection furthered valid administrative scheme whose "main purpose" was to protect health and safety of public).

344-45, 493 N.E.2d at 929-30, 502 N.Y.S.2d at 705-06 (Pet. App., p. 8a). To the contrary, the Constitution does not limit administrative regulation to the enforcement of record-keeping requirements. The administrative inspections approved in *Biswell*, *Colonnade*, and *Dewey* were all aimed at the enforcement of substantive rules of conduct, and not merely of record-keeping requirements. Indeed, in *Biswell*, as here, the defendant apparently failed to maintain required records properly, 406 U.S. at 313 n.2, and nevertheless the agents proceeded to conduct an inspection of the inventory in his locked storeroom, as authorized by statute. Thus it is clear that an administrative inspection of inventory is not limited to determining whether the inventory matches the records.

Such a limitation would have intolerable results. It would bestow on vehicle dismantlers the power to thwart any inspection of inventory simply by refusing to maintain or produce records. A dismantler who refused to maintain or produce records would be subject to administrative sanctions and criminal prosecution for failure to produce records, VTL § 415-a(5)(a), but could avoid the more serious administrative and penal sanctions that would be imposed for illegal possession of stolen property.[20]

In its effort to strip the inspection in this case of its administrative character, the court below also relied in part on

20 Criminal possession of stolen property valued in excess of $3,000 is a class D felony punishable by an indeterminate prison term of up to two and one-third to seven years. N.Y. Penal Law §§ 70.00(1), (2)(d), (3)(b), 165.50. (By an amendment that took effect on November 1, 1986, the statutory threshold of value was changed from $1,500 to $3,000. Act of July 24, 1986, ch. 515, § 6, 1986 N.Y. Laws 1120, 1122.) By contrast, refusing to produce the records that a vehicle dismantler is required to keep is a class A misdemeanor punishable by a maximum determinate prison term of only one year. VTL § 415-a(5)(a); N.Y. Penal Law § 70.15(1)(a).

The Commissioner is empowered to impose the full range of administrative sanctions either for possession of stolen property or for refusal to maintain or produce records, but might well feel constrained to follow the legislative judgment that possession of stolen property is a more serious offense than failure to maintain or produce records.

the fact that the statutes authorize police officers, as well as other regulatory agents, to conduct the inspections. 67 N.Y.2d at 344, 493 N.E.2d at 929, 702 N.Y.S.2d at 705 (Pet. App., p. 7a). That fact, however, cannot have the significance attributed to it by the court below. An otherwise constitutional inspection of commercial premises cannot become unconstitutional merely because it is conducted by police officers instead of other regulatory agents.

Police officers have many responsibilities in addition to the investigation of crimes. Indeed, the New York Court of Appeals recognized in another context that "well over 50% of police work is spent in pursuits unrelated to crime." *People v. DeBour*, 40 N.Y.2d 215, 218, 352 N.E.2d 562, 568, 386 N.Y.S.2d 375, 381 (1976). The ABA Standards for Criminal Justice, citing many studies of police behavior, similarly noted that "the data are sufficient to dispel the myth that police spend most of their time on crime-related matters." ABA Standards for Criminal Justice (Urban Police Function), Standard 1-1.1(b), commentary at 1-15 (2d ed. 1980). The Constitution does not prevent a legislature from including among the responsibilities of police officers the enforcement of a regulatory scheme. The intrusiveness of the inspection does not depend on the uniform of the inspector. As this Court noted in *Michigan v. Tyler*, 436 U.S. 499, 506 (1978), "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman."

Vehicle dismantlers are subject to both civil and criminal penalties for failing to maintain proper records, and they are subject to both civil and criminal penalties for possession of stolen property. The New York Court of Appeals unaccountably drew a distinction between the two parts of the regulatory scheme, holding that the record-keeping requirement was administrative and subject to enforcement by warrantless inspections, but the ban on dealing in stolen property was not. There is no basis for that distinction.

In sum, the New York Court of Appeals erroneously struck down a valid administrative inspection scheme, on the mistaken premise that because the inspection was designed to discover stolen property, it was necessarily a search "solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme." That holding is incorrect and should be reversed by this Court.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

*Counsel of Record for the Petitioner

December 6, 1986

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Vehicle and Traffic Law § 415-a:

> **Vehicle dismantlers and other persons engaged in the transfer or disposal of junk and salvage vehicles**
>
> 1. Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class E felony.
>
> 1-a. Definition and registration of salvage pools. A salvage pool is any person, acting on behalf of the vehicle owner or an insurance company, who sells, offers for sale or solicits bids for the sale of junk or salvage vehicles or major component parts of such vehicles, or displays or permits the display of such vehicles or parts upon premises owned or controlled by him, but who does not dismantle vehicles. No person shall engage in business as a salvage pool unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class A misdemeanor.

1-b. Definition and registration of mobile car crushers. A mobile car crusher is any person who engages in the business of operating a transportable car crusher, but who does not acquire ownership of the vehicles which he crushes. No person shall engage in the business of or operate as a mobile car crusher unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class A misdemeanor.

1-c. Itinerant vehicle collectors. An itinerant vehicle collector is any person who is engaged in the business of acquiring non-operable vehicles and who sells such vehicles or major component parts thereof to a vehicle dismantler or scrap processor. No person shall engage in business as an itinerant vehicle collector unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class A misdemeanor.

2. Application for registration. An application for registration as a vehicle dismantler, salvage pool, mobile car car crusher or itinerant vehicle collector shall be made to the commissioner on a form prescribed by him which shall contain the name and address of the applicant and the names and addresses of all persons having a financial interest in the business. Such application shall contain a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a listing of all arrests for any such violations by the applicant and any other person required to be named in such application. The application shall also contain the business address of the applicant and may contain any other information required by the commissioner.

3. Fees. The annual fee for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be fifty dollars. Upon approval of

an application, an appropriate registration shall be issued for a period of time determined by the commissioner and if issued for a period of more or less than one year, the fee shall be prorated on a monthly basis.

4. Requirements for registration. (a) Except as otherwise provided herein, no registration shall be issued or renewed unless the applicant has a permanent place of business at which the activity requiring registration is performed which conforms to section one hundred thirty-six of the general municipal law as such section applies and to all local laws or ordinances and the applicant and all persons having a financial interest in the business have been determined by the commissioner to be fit persons to engage in such business. However, the commissioner may issue a temporary registration pending final investigation of an application.

(b) The provisions of this subdivision requiring a place of business at which the activity requiring registration is performed shall not apply to a mobile car crusher nor to an itinerant vehicle collector. However, the mobile car crusher or itinerant vehicle collector must otherwise comply with all applicable local licensing laws or ordinances.

(c) Notwithstanding the provisions of paragraph (a) of this subdivision, the commissioner may issue a registration to an applicant for registration as a vehicle dismantler or salvage pool to a person who may not comply with local laws relating to zoning provided that the applicant has engaged in business at that location as a vehicle dismantler since September first, nineteen hundred seventy-three. However, the issuance of such registration shall not be a defense with respect to any action brought with respect to violation of any such local law.

5. Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner or which would be eligible to have

such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. Upon request of any agent of the commissioner and during his regular and usual business hours, a salvage pool, mobile car crusher or itinerant vehicle collector shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.

(b) Every vehicle dismantler and salvage pool shall display at his place of business at least one sign upon which his registration number and any other information required by the commissioner is affixed in a manner prescribed by the commissioner and further shall affix his registration number on all advertising, business cards, and

vehicles used by him in connection with his business. The commissioner is hereby empowered to require, by regulation, that vehicle dismantlers and salvage pools mark, stamp or tag major component parts of vehicles in their possession in a manner prescribed by the commissioner so as to enable the part so marked to be identified as having come from a particular vehicle and from a particular vehicle dismantler and salvage pool. A violation of this paragraph shall be a class A misdemeanor.

6. Suspension, revocation and refusal to renew a registration; civil penalty. (a) A registration may be suspended or revoked, or renewal of a registration refused upon a conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts, or after the registrant has had an opportunity to be heard upon any change of status of the registrant which would have resulted in refusal to issue a registration, any false statement in an application for a registration, any violation of subdivision five of this section or regulations promulgated by the commissioner with respect to this section, or any violation of title ten of this chapter.

(b) Civil penalty. The commissioner, or any person deputized by him, in addition to or in lieu of revoking or suspending the registration of a registrant in accordance with the provisions of this article, may in any one proceeding by order require the registrant to pay to the people of this state a civil penalty in a sum not exceeding one thousand dollars for each violation and upon the failure of such registrant to pay such penalty within twenty days after the mailing of such order, postage prepaid, registered or certified, and addressed to the last known place of business of such registrant, unless such order is stayed by an order of a court of competent jurisdiction, the commissioner may revoke the registration of such registrant or may suspend the same for such period as he may determine. Civil penalties assessed under

this subdivision shall be paid to the commissioner for deposit into the state treasury, and unpaid civil penalties may be recovered by the commissioner in a civil action in the name of the commissioner.

(c) In addition, as an alternative to such civil action and provided that no proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county in which the registrant is located a final order of the commissioner containing the amount of the penalty assessed. The filing of such final order shall have the full force and effect of a judgment duly docketed in the the office of such clerk and may be enforced in the same manner and with the same effect as that provided by law in respect to executions issued against property upon judgments of a court of record.

7. Registration as a dealer and as a vehicle dismantler or salvage pool. A person may be registered as a dealer under section four hundred fifteen of this chapter as well as a vehicle dismantler or a salvage pool under this section. However, any such person must obtain a separate registration for each activity and must maintain separate records for each activity.

8. Vehicle rebuilders. (a) A vehicle rebuilder is any person engaged in the business of acquiring damaged vehicles for the purpose of repairing and reselling such vehicles. In order to engage in such business, a person must be registered as a vehicle dismantler pursuant to this section or as a dealer pursuant to section four hundred fifteen of this chapter.

(b) A vehicle rebuilder shall maintain a record of all vehicles or major component parts thereof coming into his possession for the purpose of rebuilding and all major component parts used in connection with such rebuilding in a manner prescribed by the commissioner. Upon request of an agent of the commissioner or any police

officer during his regular and usual business hours, a vehicle rebuilder shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such records or to permit such inspection as required by this paragraph shall be a class A misdemeanor.

9. Scrap processor. (a) A scrap processor is any person required to be licensed under article six-C of the general business law who purchases material which is or may have been a vehicle or vehicle part for processing into a form other than a vehicle or vehicle part, but who, except as otherwise provided by regulation of the commissioner, does not sell any such material as a motor vehicle, a trailer or a major component part thereof. No person shall engage in business or operate as a scrap processor as defined in this paragraph unless he has given notice to the commissioner that he is a scrap processor and that he has complied with article six-C of the general business law, and he has been certified by the commissioner as a scrap processor. A violation of this paragraph shall be a class A misdemeanor.

(b) A scrap processor shall maintain a record of vehicles and a record of major component parts by weight coming into his possession thereof in a manner prescribed by the commissioner. This paragraph shall not apply to any major component part included in a mixed load. Upon request of an agent of the commissioner or any police officer or during his regular and usual business hours, a scrap processor shall produce such records and permit such agent or police officer to inspect them and to inspect any vehicles or major component parts of vehicles at the time of the delivery of such vehicles or parts to him. The failure to produce such records or to permit such

inspection as required by this paragraph shall be a class A misdemeanor.

10. Scrap collectors and repair shops. (a) A scrap collector is any person, other than a governmental agency, whose primary business is the collection of miscellaneous scrap for disposal, who may as an incident of such business collect vehicular parts as scrap. No person shall engage in the business or operate as a scrap collector as defined in this paragraph unless he has given notice to the commissioner that he is a scrap collector and has been certified as a scrap collector by the commissioner. A violation of this provision shall be a class A misdemeanor. No person shall be certified as a scrap collector eligible to do business within a city having a population of one million or more, or any county contiguous to such city, unless such person complies with all local requirements applicable to such business.

(b) If required by regulation of the commissioner, a scrap collector shall keep records of his acquisition and disposition of vehicular scrap in a manner prescribed by the commissioner. Upon request of an agent of the commissioner or any police officer, a scrap collector shall produce such records as may be required to be kept and permit said agent or police officer to inspect them during usual business hours or while business is being conducted. The failure to produce such records as required by this paragraph shall be a class A misdemeanor.

(c) A repair shop registered pursuant to article twelve-A of this chapter which disposes of vehicular scrap to a certified scrap processor shall apply to the commissioner for certification to carry out this disposal. The repair shop shall include in the application for certification the names and addresses of those scrap processors with whom it arranges for the disposal of its scrap. Thereafter the repair shop shall give notice to the commissioner within thirty days of any change in the scrap processors with

whom it deals. The failure to comply with this paragraph or to make fraudulent statements regarding the scrap processors with which a repair shop arranges for the disposal of vehicular scrap shall be a class A misdemeanor.

11. Out-of-state businesses. A person doing business in this state who does not have a place of business in this state, but has a place of business or engages in such business in another state or province of Canada and who would be required to be registered or certified pursuant to this section if it were in this state, shall apply to the commissioner for an identification number in a manner prescribed by the commissioner. Such identification number shall be issued provided that such person complies with all the laws and regulations of the jurisdiction in which he has his principal place of business or engages in such business applicable to such business.

12. Identification of certified persons. (a) Every person who is certified or who has been issued an identification number by the commissioner shall display such certification or identification number upon any vehicle used by him for the business of transporting vehicles or parts of vehicles, in accordance with regulations prescribed by the commissioner.

(b) It shall be a class A misdemeanor for any person required to be registered or certified pursuant to the provisions of this section to transport a vehicle or major component parts out of New York state without having and displaying his registration or certification number as provided for in this section.

13. Suspension or revocation of identification number or certification. An identification number and/or certification issued pursuant to subdivision eight, nine, ten or eleven of this section may be suspended or revoked upon conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle

or illegal possession of stolen motor vehicle parts. The commissioner may also revoke or suspend registration or certification, after an appropriate hearing where the holder of the registration or certification has had an opportunity to be heard, upon a finding of: (a) that there has been a change to the holder's status which would have resulted in a refusal to issue in the first instance, or (b) that the issuance was based upon a false statement by the holder, or (c) that there was a violation of the record keeping requirements, or (d) that there was a violation of the regulations promulgated by the commissioner pursuant to this section, or (e) that there was a violation of title X of this chapter.

14. Restrictions on scrap processors. A certified scrap processor shall not purchase any material which may have been a vehicle or a major component part of a vehicle, if recognizable as such, from any person other than a dealer registered pursuant to section four hundred fifteen of this chapter, an insurance company, a governmental agency, a person in whose name a certificate of title or other ownership document has been issued for such vehicle or a person registered or certified or issued an identification number pursuant to this section. A violation of this subdivision shall be a class A misdemeanor.

15. Regulations. The commissioner shall prescribe such rules and regulations as he shall deem necessary to carry out the provisions of this section.

New York City Charter § 436:

The commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and

their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both.

No. 86-80

In The
Supreme Court of the United States
October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

— against —

JOSEPH BURGER,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

MAHLER & HARRIS, P.C.
Attorneys for Respondent
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(718) 268-6000

STEPHEN R. MAHLER
On the Brief and
Counsel of Record

PERRY S. REICH
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York Vehicle and Traffic Law § 415-a and New York City Charter § 436, authoritatively construed by the New York Court of Appeals as authorizing general warrantless searches by police officers, rather than to assure compliance with a valid, comprehensive, regulatory scheme, are violative of the Fourth Amendment's guarantee against unreasonable searches and seizures.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

COUNTERSTATEMENT OF THE CASE

Respondent is content to rely upon the factual findings adopted by the Court of Appeals, which are binding on this Court in any event. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland R. Co. v. Railroad Comm.*, 229 U.S. 397, 412 (1913). It is necessary, however, to pinpoint two inaccuracies set forth in Petitioner's statement of the case.

1. Petitioner concedes, at p. 30 of its brief, that the *immediate purpose* of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property, a concession also contained in its State brief and quoted by the New York State Court of Appeals in its opinion. Moreover, consistent with that concession, the only police witness to testify at the suppression hearing, John Vega, described the police intrusion onto respondent's premises as simply "an inspection", presumably because he had "no idea" how those premises had been targeted for such intrusion and also admitted that neither of the two administrative agencies within whose purview the enforcement of the administrative statutes under review would lie, or, for that matter, any other administrative agency, had been contacted before the foray was undertaken.

Therefore, petitioner's characterization of the police action as "a *routine* warrantless inspection" leaves the inaccurate and misleading impression that it was a *routine* warrantless *administrative* inspection. (emphasis supplied)

2. Petitioner states that, "The Auto Crime Division was charged with the enforcement of VTL § 415-a", but

the statute itself, in pertinent part—[5.(a)]—merely talks in terms of authorizing "any police officer" to examine records and inventory.

—o—

SUMMARY OF ARGUMENT

The constitutional protections against unreasonable searches and seizures are applicable to commercial premises. Although administrative inspections conducted at such premises may be conducted on the basis of an administrative warrant, issued on a less than probable cause standard, certain "pervasively regulated" industries may be subjected to warrantless administrative inspections, where the commercial premises are part of the pervasively regulated industry and the search itself is part of a regulatory scheme designed to further an urgent state interest.

The auto parts industry does not possess the same type of history of regulation found in the liquor and firearms industries in which the Court has upheld warrantless administrative search schemes. Moreover, the statutes at issue authorize searches that are not limited in time, place and scope to insure compliance with a valid administrative scheme. Rather, they confer upon police officers. not administrative agents, the power to conduct warrantless searches for Penal Law violations, not to insure licensing requirements, and vest such police officers with unbridled discretion as to whether, when, where and why a warrantless search should be conducted, with no limitation as to frequency or duration. That the sole purpose of the warrantless search was to uncover criminal evidence has been

conceded by the People, both in the Court of Appeals and in this Court. The New York Court of Appeals so construed the statutes. Accordingly, the New York Court of Appeals properly held that the New York statutes at issue are violative of the Fourth Amendment to the United States Constitution.

—o—

ARGUMENT

Administrative inspections of private commercial property are, of course, subject to the constitutional prohibitions against unreasonable searches and seizures. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967). Warrants are generally required for most administrative searches, though they need not meet the stringent standard of "probable cause" in the criminal sense. *Marshall v. Barlow's, Inc.*, 436 U.S., at 320-321, *supra*. One engaged in an industry subject to a long-standing complex and pervasive pattern of "close supervision and inspection", *Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970), however, possesses a substantially diminished expectation of privacy and "this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections". *Donovan v. Dewey*, 452 U.S. 594, 599 (1982); *see, e.g. United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, *supra* (liquor).

Warrantless inspection schemes, however, have been sustained only in "certain carefully defined classes of cases" *Michigan v. Clifford,* 464 U.S. 287, 292, n.2 (1984), involving industries which have a history of being "pervasively regulated", *Donovan v. Dewey, supra.* Thus far, only the mining industry, *Donovan v. Dewey, supra,* firearms dealers, *United States v. Biswell, supra,* and the liquor industry, *Colonnade Catering Corp. v. United States, supra,* have been found by this Court to be within the ambit of such "pervasive regulation". As the Court observed in *Marshall v. Barlow's, Inc.,* 436 U.S., at 313, *supra,* "the clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception". rejecting the effort by the Government to "make it the rule".

Even then, in order to sustain a warrantless administrative search, the search itself must be part of a regulatory scheme designed to further an urgent state interest, and warrantless inspections must be essential to the scheme. *Donovan v. Dewey,* 452 U.S. at 600, 602-603, *supra; United States v. Biswell,* 406 U.S. at 316, *supra.* Further, the regulatory scheme must "provide[ ] an adequate substitute for a warrant in terms of the certainty and regularity of its application". *Donovan v. Dewey, supra,* at 603. In order to "satisfy 'the certainty and regularity' requirement, the inspection program must define clearly what is to be searched, who can be searched and the frequency of such searches". *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1077 (7th Cir. 1983). Finally, valid administrative searches must be distinguished from searches that are undertaken to obtain evidence of criminality. *Donovan v. Dewey, supra,* at 598, n.6;

Camara v. Municipal Court, 387 U.S. 523, 535, *supra.* An administrative search which is designed to unearth evidence of crime, rather than to serve an administrative purpose, must comport with traditional Fourth Amendment standards. *Donovan v. Dewey,* 452 U.S. at 598, n.6, *supra; Michigan v. Tyler,* 436 U.S. 499, 504-506, 512 (1978); *United States v. Lawson,* 502 F.Supp. 158, 165 (D.Md. 1980); *Commonwealth v. Lipomi,* 385 Mass. 370, 432 N.E. 2d 86, 91 (1982); Hall, Search & Seizure. § 11:8.

Examination of the statutes under review establishes that none of the criteria identified by this Court as a prerequisite to the validity of a warrantless inspection scheme have been met, and the Court of Appeals properly found the statutes at issue violative of the Fourth Amendment[1]. Point I of this brief explains why the pervasive regulation theory can have no application to the automobile parts industry. In Point II, respondent urges that the statutes at issue do not provide an adequate substitute for a warrant. Finally, in Point III, respondent argues that the statutes are not administrative in nature, but are designed solely to uncover evidence of criminality.

---

[1]The Court of Appeals did not reach other state law issues in light of this holding. Thus, should this Court disagree with respondent's arguments, the matter would have to be remanded to the New York Court of Appeals for further proceedings.

I. VEHICLE DISMANTLERS AND PARTS DEALERS ARE NOT ENGAGED IN THE TYPE OF PERVASIVELY REGULATED INDUSTRY WHICH HAS BEEN HELD BY THIS COURT TO RENDER A WARRANT REQUIREMENT SUPERFLUOUS.

In *Colonnade Corp. v. United States*, 397 U.S. 72, 75-77 (1970), this Court pointed to the "long history of the regulation of the liquor industry" which rendered the warrant requirement inapplicable to searches conducted to determine whether liquor bottles had been refilled or altered. Although Federal firearms regulation was "not as deeply rooted in history as is governmental control of the liquor industry", the Court sustained the warrantless administrative inspection statute passed by Congress based on the necessity for "close scrutiny of this traffic * * * to prevent violent crime and to assist the States in regulating the firearms traffic within their borders". *United States v. Biswell*, 406 U.S. 311, 315 (1972).

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), however, the Court returned to the historical predicate. "The element that distinguishes these enterprises [referring to *Colonnade* (liquor) and *Biswell* (firearms)] is a long tradition of close government supervision of which any person who chooses to enter such a business must already be aware". *Ibid.* More important, the Court emphasized,

> "The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception." *Ibid.*

Donovan v. Dewey, 452 U.S. 599 (1982) also emphasized the importance of an industry's regulatory past. In

upholding a provision of a federal mine safety statute which authorized warrantless inspections, the Court observed that a "warrant may not be constitutionally required when Congress has reasonably demonstrated that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes". *Id.* at 600. The Court explained that although "the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make a warrant requirement unnecessary", the length of regulation is not the only criterion. *Id.* at 606.

Several courts have viewed the automobile parts industry as pervasively regulated. *E.g. People v. Easley*, 90 Cal. App.3d 440, 153 Cal. Rptr. 396, *cert. denied*, 444 U.S. 899 (1979); *Bludworth v. Arcuri*, 416 So.2d 882 (Fla. App. 4th Dist. 1982); *Lewis v. McMasters*, 663 F.2d 954 (9th Cir. 1981); *but see, State v. Galio*, 92 N.M. 266, 587 P.2d 44 (Ct. App. 1978), *cert. denied*, 92 N.M. 260, 586 P.2d 1089 (1978); *State v. Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (1984). They have tended to focus on the automobile generally, looking to licensing and registration requirements. That, however, has not been deemed sufficient to authorize the random stopping of motorists to examine operator licenses and registrations, even though such a stop is administrative in character. *See, Delaware v. Prouse*, 440 U.S. 648 (1979).

Similarly, a warrantless inspection scheme cannot be validated on the theory that obtaining a license operates as an implied consent to surrender of Fourth Amendment rights. Recent decisions reject that approach, which some courts had found support for in *Zap v. United States,* 328 U.S. 624 (1946). *See, Spevack v. Klein,* 385 U.S. 511 (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Matter of Finn's Liquor Shop v. State Liq. Auth.,* 24 N.Y.2d 647, 658, 249 N.E.2d 440, 445 (Fuld, Ch.J.), *cert. denied,* 396 U.S. 840 (1969). So, too, the analysis in *Donovan v. Dewey, supra,* rejects the notion that by engaging in a "closely regulated industry", a businessman "in effect" consents to warrantless inspections. *See,* 1 LaFave and Israel, Criminal Procedure, § 3.9(c). Rather, an analysis must be made of the particular regulatory scheme under the balancing test of *Camara v. Municipal Court,* 387 U.S. 523, *supra, i.e.* balancing the need to search against the invasion which the search entails, during which another form of "implied consent", that businessmen consent to entry by the general public to public parts of their business during regular business hours, is properly taken into account. *Ibid.*

The automobile parts industry and secondhand dealers have, of course, been subject to regulation. But that regulation has been no different than numerous other commercial enterprises. They have never been subjected to the type of close scrutiny such as the firearms or liquor industry.

Nor have such enterprises been completely opened to the public, which would diminish a proprietor's right of privacy in non-public areas. A warrant requirement would

not place undue burdens upon the state and would prevent generalized searches conducted at the whim of law enforcement officials whenever and wherever they decided. It would prevent the harassment of legitimate businessmen by police officers, a problem which, unfortunately, has been identified by various New York State investigative commissions. *See, e.g.* Report of the New York Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedure (The Knapp Commission), August 3, 1972.

To hold the automobile parts and secondhand dealers industries to be on a par with the liquor and firearms industries could swallow up the exception and turn *Colonnade* and *Biswell* into the general rule. The Court declined to take that step in *Marshall v. Barlow's, Inc., supra,* and it should decline to take that step now.

II. THE STATUTES AT ISSUE DO NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR A WARRANT.

Neither New York City Charter § 436 nor New York Vehicle and Traffic Law § 415-a provide "an adequate substitute for a warrant in terms of the certainty and regularity of its application". *Donovan v. Dewey,* 452 U.S. 594, 603 (1982). The statutes do not "define clearly what is to be searched, who can be searched, and the frequency of such searches". *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1077 (7th Cir. 1983). Neither statute limits the discretion of the police officers undertaking the warrantless searches in any respect.

Professor LaFave, in his treatise, 2 LaFave, Search and Seizure, § 10.2(f), at 236-237, offers a useful discus-

sion that concerns the various methods by which limitation in scope can be achieved:

> "One is a careful statement in the legislative or administrative standards as to precisely what things may be examined, such as certain types of records. Another is a careful statement of the limited purposes of the inspection program, which might be taken to convey to the inspector an understanding as to where he should look in order to accomplish those purposes. Also, it would seem that existing scope limitations would be entitled to somewhat greater weight where by law the inspections may be conducted only by specialized inspectors who could be expected to understand and adhere to the stated scope limitations, rather than by any law enforcement officer."

The New York statutes under review contain none of these safeguards. Rather, as the New York Court of Appeals held, they simply authorize general police exploratory searches.

First, like the statutory scheme held overly broad in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323-24, nn. 21-22 (1978), the statutes under review permit police officers to roam at will throughout the business premises. *See, e.g. Bionic Auto Parts & Sales v. Fahner*, 721 F.2d at 1080, *supra* (sustaining Illinois statute which "delineates specifically what is to be searched"); *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 684-685 (2d Cir.) (Friendly, J.), *cert. denied*, 419 U.S. 875 (1974).

Second, unlike the statute sustained in *Bionic Auto Parts & Sales v. Fahner, supra*, at 1080, the statutes here do not describe how searches are to be conducted and do not limit the temporal duration of the search. Indeed, the New York City Charter does not even limit the ability to search to reasonable business hours. It simply provides

that police officers, as the delegates of the police commissioner "in connection with the performance of *any* police duties * * *, have the power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession". New York City Charter § 436. (emphasis supplied)

Petitioner's claim that "The New York City Administrative Code limits that authority to inspections conducted at 'reasonable times' ", citing *People v. Pace*, 111 Misc. 2d 488, 491, 444 N.Y.S.2d 529, 531 (Sup. Ct. 1981), *revd.* 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dept. 1984), *affd.* 65 N.Y.2d 684, 481 N.E.2d 250 (1985), Pet. Br. p.22, is disingenuous at best. Rather, the trial judge in *Pace* misread the statute.

Even the dissenters of the Appellate Division rejected the argument—made by the same District Attorney's office—that the Administrative Code provisions modified the charter. As Justice Mangano observed for himself and Justice Weinstein in dissent:

> "The People argue that subdivision d of section B32-132.0 of the Administrative Code of the City of New York provides that administrative searches are to be conducted during 'all reasonable times'. However, a review of the language of that section indicates that it speaks only with regard to the inspection of a certain record book which is required to be kept by every dealer in secondhand articles and does not speak at all about administrative searches and inspections of merchandise or inventory."

101 A.D.2d at 347, n.2, 475 N.Y.S.2d at 450.[2]

---

[2]It is evident that the majority was of the same view. 101 A.D.2d at 339, n.2, 475 N.Y.S.2d at 445, n.2.

In short, New York City Charter § 436 permits general searches at any time, without limitation. For that reason alone, it is violative of the Fourth Amendment. *See, e.g. Hodge v. Hedrick,* 391 F.Supp. 91 (E.D. Va. 1974); *Washington Message Foundation v. Nelson,* 87 Wash.2d 948, 558 P.2d 231 (1976); 2 LaFave, Search and Seizure, *op. cit.,* § 10.21(f), at 237; *cf. Wayne Consumarro, Inc. v. Blick,* 692 F.2d 1025, 1028-1029 (5th Cir. 1982) (approving warrantless searches limited to ordinary business hours).

Although New York Vehicle and Traffic Law § 415-a does limit inspections to "regular and usual business hours", this does not suffice. The statute construed in *Marshall v. Barlow's, Inc., supra,* permitted administrative searches to be performed only "at . . . reasonable times, and within reasonable limits and in a reasonable manner", 29 U.S.C. § 657(a). The regulations promulgated echoed the statutory language. 29 CFR § 1903.3 (1977). Yet, the Court invalidated the scheme because it devolved "almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search". 436 U.S., at 323.

Finally, neither of the statutes limit the number of inspections that may be conducted within any given period. Police officers are permitted to conduct daily warrantless searches, if they so desire. *Cf. Bionic Auto Parts & Sales v. Fahner,* 721 F.2d at 1080, *supra* (no more than six inspections during six month period).

Thus, the statutes under review delegate to police officers in the field "almost unbridled discretion * * * as to when to search and whom to search". *Marshall v. Barlow's, Inc.,* 436 U.S. at 307, *supra.* Petitioner has not identified any "administrative plan containing specific neutral criteria". *Ibid.*

United States v. Biswell, supra, upon which petitioner places almost total reliance, is pointedly different. The Court recognized as much in *Donovan v. Dewey, supra,* when, after detailing the time, manner and frequency of inspections limited by the statute and regulations promulgated thereunder, wrote:

> "Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence. Like the gun dealer in *Biswell,* the operator of a mine 'is not left to wonder about the purposes of the inspector or the limits of his task.' 406 U.S., at 316.
>
> "Finally, the Act provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. The Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. 30 U.S.C. § 818(a) (1976 ed., Supp. III). This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have. See, e.g., *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589, 594 (CA3 1979) (inspectors ordered to keep confidential mine's trade secrets), cert. denied, 444 U.S. 1015 (1980)."

452 U.S. at 604-605.

In marked contrast to *Biswell,* businessmen governed by the provisions of New York City Charter § 436 and New

York Vehicle and Traffic Law § 415-a are "left to wonder about the purposes of the inspector [and] the limits of his task". 406 U.S., at 316.[3] This is particularly acute where, as here, the search is conducted by the police, rather than administrative agents, because "police have general criminal investigative duties which exceed the legitimate scope and purposes of purely administrative inspections". *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86, 91 (1982). The failure of the State of New York to place careful limitations on the time, manner and frequency of warrantless inspections render New York City Charter § 436 and New York Vehicle and Traffic Law § 415-a unconstitutional.

III. THE STATUTES AT ISSUE ARE NOT ADMINISTRATIVE IN NATURE.

Warrantless administrative inspections have been sustained because the purpose of the inspection is to insure compliance with an administrative scheme rather than to unearth evidence of criminal activity. It is basic that absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant. *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10 (1948). And this Court

[3]Indeed, the regulations promulgated by the Secretary of the Treasury under the Gun Control Act are quite detailed, consisting of 149 parts. 27 CFR, part 178, §§ 178.1-178.149 (1986). The inspections can only be undertaken by an Alcohol, Tobacco and Firearms officer, during business hours, and the inspection itself limited to specified items and areas which comport with the administrative scheme. 27 CFR § 178.23 (1986). *See also, Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986) (similar limitations) under Magnuson Act, 16 U.S.C. § 1801 *et seq.*

has held that "these same restrictions pertain when commercial property is searched for contraband or evidence of crime". *Donovan v. Dewey*, 452 U.S. 594, 598, n.6 (1981), citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-359 (1977). As then Justice Rehnquist observed in the course of his concurring opinion in that case, *id.* at 608:

> "I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining."

In this case, New York City Charter § 436 explicitly permits police officers to search commercial property, at any time, "in connection with the performance of *any* police duties" (emphasis supplied).[4] Although New York Vehicle & Traffic Law § 415-a does have some administrative aspects to it, the searches it authorizes are not related to an administrative scheme. As Police Officer Vega testified at the suppression hearing, and the Court of Appeals found, "the ensuing search was undertaken solely to dis-

[4]In this regard, it is significant to note that, in this case, Police Officer John Vega admitted during his suppression hearing testimony that neither of the two administrative agencies that would have had an interest in the enforcement of these statutes (or, for that matter, any other administrative agency) was contacted by the police before the so-called administrative inspection was conducted.

cover whether defendant was storing stolen property on his premises", not to ascertain whether there had been compliance with any regulatory scheme. 67 N.Y.2d at 345, 493 N.E.2d at 930. Indeed, the Court of Appeals quoted petitioner's concession in its brief, "that 'the immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property' " *ibid.* That concession is repeated here. Pet. Br., p.30.

Nonetheless, petitioner urges that the criminal aspect of the search is of no moment, so long as it can point to some purported administrative purpose, however tangential. Once again, it hinges its argument to *United States v. Biswell,* 406 U.S. 311 (1972), and once again that reliance is misplaced.

In *Biswell,* this Court upheld warrantless inspections of firearms dealers which were conducted pursuant to the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* Significantly, the inspection was conducted by an agent of the regulatory agency, not a police officer, in order to ascertain whether there had been compliance with the licensing, record-keeping and occupational tax requirements of that statute. Indeed, the right to inspect is expressly limited to Alcohol, Tobacco and Firearms agents by regulation 27 CFR § 178.23 (1986). So, too, in *Donovan v. Dewey, supra,* and *Colonnade Catering Corp. v. United States, supra,* other instances in which warrantless inspection schemes were upheld, the searches were conducted to insure compliance with administrative purposes, not to search for evidence of crime, and the searches were conducted by administrative agents. Further, the administrative agents reported back to an administrative agency, not to the police.

The fact that police officers, rather than administrative agents, conduct the warrantless searches, and are not under the aegis of any administrative agency, cannot be lightly brushed aside. As the Supreme Judicial Court of Massachusetts has observed, "[s]earches by the police are inherently more intrusive than purely administrative inspections. Moreover, unlike administrative agents, the police have general criminal investigative duties which exceed the legitimate scope and purposes of purely administrative inspections". *Commonwealth v. Lipomi,* 385 Mass. 370, 432 N.E.2d 86, 91 (1982); *see also, Commonwealth v. Frodyma,* 386 Mass. 434, 436 N.E.2d 925 (1982); *State v. Williams,* 84 N.J. 217, 227, 417 A.2d 1046, 1050 (1980); *United States v. Russo,* 517 F. Supp. 158 (D.Md. 1980); *United States v. Anile,* 352 F. Supp. 14 (N.D. W.Va. 1973); *State v. Sidebotham,* 124 N.H. 682, 474 A.2d 1377 (1984).

Thus, in sustaining the New York statute authorizing the inspections of druggists' narcotic records, Judge Friendly took pains to emphasize that the statute had been amended "to restrict the right of inspection to representatives of the Health Department, * * * rather than 'all peace officers within the state' ". *United States ex rel. Terraciano v. Montanye,* 493 F.2d 682, 685 (2d Cir.), *cert. denied,* 419 U.S. 875 (1974); *see also,* 2 LaFave, Search & Seizure, *op. cit.,* § 10.2(f) at 237.

Indeed, petitioner can point to no case in which this Court has sustained an administrative warrantless search made by a police officer where, in the words of the New York Court of Appeals, the "asserted 'administrative schemes' * * * are, in reality, designed to give the police

an expedient means of enforcing penal sanctions for possession of stolen property".[5] 67 N.Y.2d at 344, 493 N.E.2d at 929. Nor is there room for argument that this is an oversight.

A criminal statute authorizing unannounced, warrantless searches of property reasonably believed to contain unlawful narcotics activity would doubtless violate the Fourth Amendment, irrespective of the public interest in regulating and preventing drug-related crime and irrespective of any administrative bookkeeping regulatory requirement attached to such a statute. *See, Donovan v. Dewey,* 452 U.S. at 608, *supra* (Rehnquist, J., concurring in the judgment). Yet, as the New York Court of Appeals found, and petitioner has effectively conceded, both in the New

---

[5]It should be noted that the statutes at issue have been the subject of abuse, having been employed to justify pretext searches for evidence of crime, e.g., *People v. Pace,* 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dept. 1984), *affd.* 65 N.Y.2d 684, 481 N.E.2d 250 (1985); *People v. Camme,* NYLJ, Nov. 2, 1981, p.16, col.2; *People v. Sullivan,* 129 Misc.2d 747, 493 N.Y.S.2d 932 (Sup.Ct. Queens Co. 1985), *affd.* — AD2d —, — N.Y.S.2d — (2d Dept. 1986), and, routinely, as a way to avoid having to make an application for a search warrant. See, *People v. Salamino,* 107 A.D.2d 827, 484 N.Y.S.2d 666 (2d Dept. 1985); *People v. Robles,* 124 Misc.2d 419, 477 N.Y.S.2d 567 (Sup.Ct. Kings Co. 1984); *People v. Leto,* 124 Misc.2d 549, 478 N.Y.S.2d 765 (Sup.Ct. Queens Co. 1984); *People v. Ost,* 127 Misc.2d 183, 485 N.Y.S.2d 483 (Sup.Ct. Queens Co. 1985), *affd.* — A.D.2d —, 503 N.Y.S.2d 620 (2d Dept. 1986); *People v. Martinelli,* 117 Misc.2d 310, 458 N.Y.S.2d 785 (Sup.Ct. Kings Co. 1982); *Mubarez v. State,* 115 Misc.2d 57, 453 N.Y.S.2d 549 (Ct.Cl. 1982); *People v. Camme,* 112 Misc.2d 792, 447 N.Y.S.2d 621 (Sup.Ct. Queens Co. 1982); *People v. Ruggieri,* 102 Misc.2d 238, 423 N.Y.S.2d 108 (Sup.Ct. Kings Co. 1979); *People v. Tinneny,* 99 Misc.2d 962, 417 N.Y.S.2d 840 (Sup.Ct. Kings Co. 1979); *People v. Kelly Freedman & Son, Inc.,* 95 Misc. 2d 564, 407 N.Y.S.2d 963 (Albany Co.Ct. 1978).

York Court of Appeals and in this Court, that is precisely how the statutes under review here operate. The holding of the New York Court of Appeals is correct and should be affirmed.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

MAHLER & HARRIS, P.C.
Counsel for Respondent
125-10 Queens Boulevard
Kew Gardens, New York 11415
(718) 268-6000

STEPHEN R. MAHLER
On the Brief and
Counsel of Record

PERRY S. REICH
On the Brief

No. 86-80 (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

**Counsel of Record for the Petitioner*

February 14, 1987

11PP

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-80

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The statutory scheme at issue in this case is identical in all relevant respects to the federal statute upheld by this Court in *United States v. Biswell*, 406 U.S. 311 (1972). The efforts of defendant and *amicus curiae* ACLU to find a distinction rest on a series of mistakes, set forth below, concerning both the *Biswell* statute that regulates licensed dealers in firearms, and the New York statute that regulates licensed vehicle dismantlers. If this Court were to uphold the distinction, it would in effect be holding that only Congress, and not the states, may constitutionally authorize warrantless inspections of a regulated industry. That simply cannot be the law.

1. The Treasury agents who conduct inspections under the federal Gun Control Act, like the police officers who conduct inspections under New York's VTL, are authorized to carry firearms and to make arrests for any federal crimes, and not merely crimes related to the regulatory scheme they enforce. 27 C.F.R. § 70.28.[1] The suggestion that the Constitution permits inspections by Treasury agents but not by police officers (Resp. Br. at 16-17, *Amicus* Br. at 39) elevates form over substance.[2] The fourth amendment provides no reason to distinguish between inspections conducted by specialized agents and those conducted by police officers. Moreover, because federal law enforcement is conducted by a number of specialized law enforcement agencies, whereas state and local law enforcement is more commonly conducted by nonspecialized police forces, the principal effect of the distinction would be to strike down state regulatory statutes while upholding similar federal statutes. The Constitution does not require that result.

2. The business of selling firearms is no more complex, dangerous, or otherwise suitable for regulation than the business of dismantling vehicles or selling secondhand goods. *Amicus* ACLU suggests that administrative regulation of vehicle dismantlers is inappropriate because, unlike gun and liquor dealers and industries governed by safety codes, vehicle dismantlers do not present issues involving the unique economic and social conditions of the modern state, or modern urban and technological conditions (*Amicus* Br. at 28). They are wrong on two counts.

First, the Constitution does not distinguish between regulation of industries dominated by modern technology and other industries. *Donovan v. Dewey*, 452 U.S. 594, 605-06 (1981).

---

1 Likewise the Internal Revenue agents who conducted inspections under the liquor laws at issue in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), were authorized to carry firearms and to make arrests. 26 U.S.C. § 7608(a).

2 Indeed, the distinction collapses on the facts of *Biswell*, where the federal agent was accompanied by a city police officer. 406 U.S. at 312.

Second, vehicle dismantlers in fact present not simply the age-old problem of theft, but a problem peculiar to modern technology and the economic conditions of the modern state. Motor vehicles, after all, are the lifeblood of the modern state, and the problem of tracing stolen cars is peculiarly difficult for reasons relating to modern technology: because motor vehicles are made from standardized parts, it is profitable to dismantle a stolen car and resell its parts to a multitude of different buyers. The vehicle dismantling industry, which is a product of modern technology and the modern state, is uniquely capable of facilitating the traffic in stolen cars. Vehicle dismantlers, like the firearms dealers regulated in *Biswell*, are regulated and inspected in order to prevent the industry from promoting crime.

Just as Congress reasonably sought to prevent violent crime by regulating the businesses that sell firearms, so New York reasonably seeks to prevent motor vehicle theft by regulating the businesses that dismantle vehicles and sell their parts. *See* W. LaFave & A. Scott, Jr., *Criminal Law* § 8.10, at 765 (2d ed. 1986) (without professional receivers of stolen property, "theft ceases to be profitable"); 2 *Encyclopedia of Crime and Justice* 789 (S. Kadish ed. 1983) (existence of receivers of stolen property "inspires 95 percent or more of the theft in America"); 4 *id.* 1550 (one approach to problem of professional receiver of stolen goods is "to license and regulate pawnshops, junk dealers, and secondhand stores"); Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich. L. Rev. 1511, 1512 (1976) (development of sophisticated fencing systems "has paralleled the industrialization of society").

Indeed, this Court recently dismissed a fourth amendment challenge to a Colorado statute imposing a similar regulatory scheme on dealers in coins and precious and semiprecious stones and metals. *Exotic Coins, Inc. v. Beacom*, 106 S. Ct. 214 (1985), *dismissing for want of a substantial federal question appeal from* 699 P.2d 930 (Colo. 1985). That statute, like the statutes at issue here, required dealers to record their

inventory and authorized warrantless inspections of both records and inventory. That statute, like the statutes here, sought to deter the traffic in stolen valuable property by regulating the dealers.

3. Defendant and *amicus* ACLU suggest that New York's regulations are not voluminous enough to qualify as a genuine administrative inspection scheme (Resp. Br. at 14 n.3, *Amicus* Br. at 32-39), but surely the constitutional validity of an administrative scheme is not measured by the number of regulations it generates. Ten pages of regulations are adequate to specify the form and content of the records required to be kept by vehicle dismantlers. The regulations prescribe that records must be kept in a permanently bound book, and that inventory must be recorded chronologically and in a form that precludes subsequent alteration. *See* N.Y. Comp. Codes R. & Regs. tit. 15, Part 81. These regulations are well suited to the purpose of preventing vehicle dismantlers from dealing in prohibited inventory.

Similarly, *amicus* ACLU suggests that because New York does not prescribe numerous qualifications for a vehicle dismantler's license, the licensing requirement is "more a formality than a serious regulatory effort" (*Amicus* Br. at 32-33). To the contrary, the licensing requirement is no less genuine because its principal concern is to screen out of the industry persons who have been convicted of crimes and are likely to use a vehicle dismantling business to dispose of stolen property. The regulations are adequate to accomplish their wholly legitimate purpose.

4. The administrative scheme in *Biswell*, like the one at issue here, regulated both inventory and recordkeeping, and authorized inspections to insure compliance with both aspects of the law. *Amicus* ACLU suggests that *Biswell* did not approve any inspection of inventory after the officers determined that the defendant was in violation of the recordkeeping requirements (*Amicus* Br. at 37-38), but they are mistaken. In *Biswell*, after

the agent had determined that the defendant's records were inadequate under the statute, he proceeded to inspect the inventory, as he was authorized to do by statute, for evidence that the defendant was dealing in illegal weapons. 406 U.S. at 311-12. So too here, after the officers had determined that defendant had failed to maintain statutorily required records, they inspected his inventory for evidence that he was dealing in stolen vehicles or parts.

The suggestion that this amounts to a search "for evidence of further crimes unrelated to the regulated business" (*Amicus* Br. at 38) is simply absurd. Whether the regulated businessperson is a firearms dealer or vehicle dismantler, the question whether that business is dealing in prohibited inventory is central to the regulated business and not, as *amicus* suggests, unrelated to it.[3]

5. Defendant and *amicus curiae* attack three particular features of the statutes at issue here, but each of these features was present in the statute upheld by this Court in *Biswell*. First, they object that the statutes at issue here contain no explicit limitation on the frequency of inspection (Resp. Br. at 12, see also *Amicus* Br. at 49). No such limitation is found in the gun control statute upheld in *Biswell* or for that matter in the mine safety statute upheld in *Donovan v. Dewey*, 452 U.S. 594 (1981). Indeed, while *amicus curiae* points with approval to the mine safety statute as one which defines the frequency of inspection (*Amicus* Br. at 49), the statute does so by setting a minimum and not a maximum on the number of inspections to be conducted annually. *See* 452 U.S. at 604.

Second, they suggest that either an adminstrative warrant or some other forum for pre-inspection judicial review is constitutionally required (*Amicus* Br. at 44-51, see also Resp. Br. at

---

3 Indeed, the crime for which the defendant in this case was convicted was not simply criminal possession of stolen property, but rather possession of stolen property by a person who "is a pawnbroker or is in the business of buying, selling or otherwise dealing in property." N.Y. Penal Law § 165.45(3) (McKinney 1975).

13). To the contrary, while constitutional concerns may be safeguarded by a warrant requirement, *See v. City of Seattle*, 387 U.S. 541 (1967), or by alternative forms of pre-inspection review, *Donovan v. Dewey*, 452 U.S. 594 (1981), this Court in *Biswell* and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), approved inspection statutes with neither feature.

Third, *amicus* ACLU attempts to attack the constitutionality of the statutes on the ground that "the authorized response where permission to search is refused is search by the forcible compulsion of armed police officers" (*Amicus* Br. at 50). This attempt fails for two reasons.

First, neither VTL § 415-a nor Charter § 436 authorizes the use of force to carry out inspections. Instead, each statute merely authorizes the imposition of criminal penalties for refusal to permit an inspection. VTL § 415-a(5)(a) (class A misdemeanor); Charter § 436 (offense punishable by prison term of up to thirty days, or fine of up to fifty dollars, or both). As this Court held in *Colonnade Catering Corp. v. United States*, 397 U.S. at 77, absent an express provision authorizing the use of force, the criminal penalties are the exclusive sanction under the statutory scheme for refusing an inspection. In this case as in *Colonnade*, there is simply no ground to read into the statutory scheme any authority to compel an inspection through force. Therefore, VTL § 415-a and Charter § 436 cannot be found constitutionally defective based on the speculative possibility of forcible inspections that are not authorized by the statutes.

Second, defendant cannot challenge the statutes on the ground that they could conceivably be applied in an unconstitutional manner in some hypothetical situation not before the Court. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Rather, defendant's challenge must be strictly limited to the facts of this case, which do not involve a forcible entry. The police officers who conducted the inspection of defendant's junkyard did not use any force to carry out the inspection.

Indeed, defendant never objected to the inspection at all. Similarly, defendant cannot challenge the statutes on the ground that they might be abused in another case through an inspection conducted merely as a pretext for a search in furtherance of a criminal investigation (Resp. Br. at 18 n.5). The courts below have uniformly found that no such abuse occurred in this case. 67 N.Y.2d at 342-43, 493 N.E.2d at 928, 502 N.Y.S.2d at 704 (Pet. App., pp. 5a-6a); 112 A.D.2d 1046, 493 N.Y.S.2d at 35 (Pet. App., pp. 9a-10a); 125 Misc.2d at 714, 479 N.Y.S.2d at 940 (Pet. App., p. 16a).

6. The statutes at issue here, like those approved in *Biswell* and *Colonnade*, bear no resemblance whatever to the specter raised by defendant and *amicus* ACLU of a criminal statute authorizing "unannounced warrantless searches of property reasonably thought to house unlawful drug activity" (Resp. Br. at 15, 18-19, *Amicus* Br. at 25-26, 30, quoting *Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring)). Such a statute would authorize searches of any homes or businesses, while the statutes at issue here cover only a well-defined class of pervasively regulated businesses, with a unique potential for facilitating the precise illegal activity that prompted the administrative scheme. Moreover, such a statute would authorize searches based on mere suspicion of crime rather than probable cause; the statutes at issue here, by contrast, prohibit searches based on either suspicion or probable cause, and require instead a routine inspection schedule whose subjects are selected without regard to any suspicion of crime.

While the legislature could not authorize warrantless inspections of all suspected drug locations by purporting to regulate the narcotics industry, it can and does attack the problem of illegal drug activity by regulating the pharmacy business. In *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974), the Second Circuit upheld New York statutes that authorized warrantless inspections, at the premises of licensed pharmacists, of records relating to narcotics and to stimulant or depressant drugs. The

statutes applied only to a well-defined class of businesses that carried a unique potential for involvement in illegal drug activity, and the statutes authorized inspection of records only at the business premises. In addition, the pharmacy industry is "properly subject to intensive regulation in the public interest," *id.* at 685, so pharmacists have a reduced expectation of privacy in their business premises. *Terraciano* thus demonstrates that, through a properly-limited statute, the State may indeed constitutionally seek to prevent drug-related crime by means of a scheme of warrantless inspections.

CONCLUSION

The statutes in this case are indistinguishable from those upheld by this Court in *Biswell* and *Colonnade*, and satisfy well-established constitutional requirements. Defendant's efforts to draw a distinction are unsupported by either fact or reason. The New York Court of Appeals erroneously believed that this Court's precedents compelled it to invalidate the statutes. That judgment should be reversed.

Respectfully submitted,

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
LEONARD JOBLOVE
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

*Counsel of Record for the Petitioner

February 14, 1987

86-80 (6)

No. 86-80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK,

Petitioner,

—v.—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF THE RESPONDENT

GERARD E. LYNCH
Counsel of Record
435 West 116th Street
New York, New York 10027
(212) 280-8232

ALVIN J. BRONSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800
Attorneys for *Amici Curiae*

RICHARD EMERY
New York Civil
Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

QUESTION PRESENTED

Is a state statute that purports to authorize warrantless searches, undertaken without probable cause or indeed any reasonable suspicion of criminal activity, to discover evidence of criminal violations rather than to secure compliance with a comprehensive regulatory scheme, consistent with the Fourth Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States. The New York Civil Liberties Union is a state affiliate of the ACLU.

The ACLU has long worked to protect the rights of criminal defendants, and in particular the rights of all persons under the Fourth Amendment of the Constitution "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Toward that end, the ACLU has filed many briefs in this Court, as counsel for a litigant or as amicus curiae, in cases requiring the interpretation of the Fourth

Amendment or of other federal constitutional provisions related to criminal cases.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae.

STATEMENT OF THE CASE

On November 17, 1982, five plainclothes New York City police officers entered Joseph Burger's business premises and announced that they were going to search his property. Mr. Burger's premises, used for his scrap metal business, were enclosed by a thirteen- or fourteen-foot-high, opaque metal fence, and separated by 200 feet of privately-owned property from the nearest public street. The officers proceeded to execute a thorough search of the premises, examining automobiles, automobile parts and other items found there, copying their identification or serial numbers, and determining whether such items had been reported stolen.

The only conceivable purpose for such a search, and indeed, its conceded purpose in

this instance, was to determine whether Mr. Burger was in possession of stolen property. Yet the officers possessed no warrant of any kind. Indeed, it is conceded that they had no information whatever (much less probable cause) suggesting that Mr. Burger was involved in criminal activity or that any evidence of crime would be found on his premises. The search, rather, was based entirely on a police department policy of conducting random searches of junkyards or "automobile dismantlers," to determine whether they possessed stolen property. This policy is purportedly authorized by two New York statutes.*

On June 27, 1984, Mr. Burger pled guilty to criminal possession of stolen property in

---

* The relevant statutes are set forth in Appendix A.

the second degree, N.Y.P.L. §165.45(3), after the denial of his properly-presented motion to suppress items seized during the warrantless "inspection" of his premises, and the Appellate Division of the Supreme Court of New York affirmed.

Leave to appeal to the Court of Appeals, the state's highest court, was granted, and on May 8, 1986, the Court of Appeals reversed the conviction. People v. Burger, 67 N.Y.2d 338. The Court held "that Vehicle and Traffic Law §415-a(5)(a), which authorizes warrantless inspections of vehicle dismantling businesses, and New York City Charter §46, which authorizes warrantless searches of junkyards and other businesses storing used, discarded or secondhand merchandise, violate the constitutional proscription against unreasonable searches and seizures." Id. at 340. The

Court rejected the State's argument that the statutes authorized valid "administrative inspections," finding that the statutes bore no relation to any administrative scheme, but merely purported to authorize warrantless searches of certain businesses that the legislature suspected occasionally harbored criminal activity:

> The fundamental defect in the statutes before us is that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted "administrative schemes" here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property.

Id. at 344.

This Court granted certiorari on October 6, 1986.

ARGUMENT

A STATE MAY NOT AUTHORIZE SEARCHES OF PRIVATE BUSINESS PREMISES, WITHOUT WARRANT OR PROBABLE CAUSE, TO UNCOVER EVIDENCE OF ORDINARY CRIMINAL VIOLATIONS.

Mr. Burger was subjected to precisely the sort of unconstitutional search and seizure that the Fourth Amendment was specifically intended to prohibit. A general search of enclosed property for the purpose of uncovering evidence of ordinary crimes is the very kind of intrusion that most concerned the framers of the Fourth Amendment. This Court has consistently held that such searches ordinarily may be conducted only if authorized by a warrant from a neutral magistrate, which in turn will issue only upon a showing of probable cause to believe that a crime has been committed, and that particularly-described evidence of that crime will be found at the particular place to be searched.

If the police themselves had evolved a policy of "routine" searches of private business premises, there could be no doubt of its unconstitutionality. The only difference between that very model of an unconstitutional search and the case at bar is that in this case the New York legislature has authorized the conduct at issue. It is of course well established that this is no difference at all; the legislature cannot authorize police officers to do what the Constitution forbids them to do. Sibron v. New York, 392 U.S. 40, 61 (1968).

New York's argument to the contrary in this case is based upon a fundamental misreading of this Court's precedents regarding "administrative searches." The State's argument attempts to turn carefully limited

doctrines delineating with the outer boundaries of the Fourth Amendment into a device to permit legislative evasion of its core prohibitions. A proper reading of the cases will not support such an argument.

A. Searches And Seizures Of Criminal Evidence Are Presumptively Invalid Unless Based On A Warrant Supported By Probable Cause.

The general proposition that a search and seizure is reasonable only if based on a warrant supported by probable cause is so well-established as hardly to require support. As this Court declared nearly 20 years ago, in all the vagaries of Fourth Amendment jurisprudence, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized

by a valid search warrant." Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). See also Katz v. United States, 389 U.S. 347, 357 (1967). The text of the Fourth Amendment itself tells us, moreover, what is ordinarily required of such warrants: "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Unless this case falls into one of the "carefully defined classes of cases" that constitute exceptions to these principles, the search and seizure that led to Mr. Burger's conviction must be found unconstitutional, because it violates each of these most fundamental commands:

(1) The search was conducted without a warrant, thus denying the opportunity for an

"informed and deliberate determination," United States v. Lefkowitz, 285 U.S. 452, 464 (1932), by a "neutral and detached magistrate," Johnson v. United States, 333 U.S. 10, 14 (1948), of the justification for intruding into protected privacy.

(2) The search was conducted without that probable cause that alone would justify a full search of private property, with or without a warrant. The officers conducting the search possessed no information whatever that could justify the conclusion that "there [was] a fair probability that contraband or evidence of a crime would be found" on Mr. Burger's premises. Illinois v. Gates, 462 U.S. 213, 238 (1983).

(3) Because the police lacked any basis for a belief that any particular item of contraband or evidence would be found, the search was necessarily a general search,

conducted without the constitutionally-required particularity as to the place to be searched or the things to be seized. See Marron v. United States, 275 U.S. 192 (1927). Far from having a warrant authorizing them to search for and seize any particular item, the officers lacked even a subjective, private notion of what they were looking for: the premises were searched simply to see if anything suspicious would turn up.

The search involved in this case was thus the paradigm of what the framers of the Fourth Amendment intended to prohibit: a general search of private property for evidence of unlawful behavior, unauthorized by judicial order, unjustified by probable cause, and unlimited by any specific objective. Mr. Burger's business was singled out for this general ransacking not by any evidence that

his premises harbored evidence of wrongdoing, nor even, as far as this record shows, by any systematic plan of routine inspections, but simply by the whim of someone in the police department. A closer analogy to the searches conducted under the colonial writs of assistance that were the particular target of the Fourth Amendment, see T. Taylor, Two Studies in Constitutional Interpretation (1969), can hardly be imagined.

Neither the business nature of Mr. Burger's premises nor the purported legislative authorization for the police conduct affects these fundamental principles. The constitutional protection against unreasonable searches and seizures is fully applicable to commercial premises, Donovan v. Dewey, 452 U.S. 594, 598 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) and this Court

has repeatedly invalidated searches of business premises that violated Fourth Amendment norms. See, e.g., Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Nor can the legislature authorize conduct that would violate the Constitution if performed on the police officer's own "authority." A state "may not ... authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. at 61. See also Tennessee v. Garner, 105 S.Ct. 1694 (1985). The analogy to the writs of assistance emphasizes these points: the writs primarily affected business property, and were authorized by legislation. See Marshall v. Barlow's, Inc., 436 U.S. at

311-12; T. Taylor, Two Studies in Constitutional Interpretation, supra, at 35.

The starting point for analysis of this case, then, is clear. The search challenged by respondent was the very kind of random, unjustified general search for unspecified evidence of crime that the Fourth Amendment was intended to outlaw. Unless some exception to what are ordinarily regarded as the basic principles of the Fourth Amendment applies, the evidence it produced must be suppressed and the decision below affirmed.

B. The Search In This Case May Not Be Justified As An "Administrative Inspection."

Throughout this litigation, the State of New York has attempted to find an exception to these fundamental principles by relying on a line of cases, beginning with this Court's

1967 decisions in Camara v. Municipal Court, supra, and See v. City of Seattle, 387 U.S. 541 (1967), that deal with administrative and regulatory inspections of property designed to enforce compliance with various health and safety regulations. Although these cases do make clear that the unique necessities of certain regulatory schemes necessitate a somewhat different, and in some ways less rigorous, balancing of factors to determine the constitutional reasonableness of an intrusion into privacy, they clearly do not justify the search in this case.

First, and most fundamentally, the search here was not part of an administrative scheme to require health and safety standards, or to regulate the methods of operation of a particular business. Rather, it was a police search for evidence of possible criminal

violations. No case in the Camara line is comparable in this regard, and both the Court and various separate opinions have made quite clear that the "administrative inspection" rationale does not apply in such circumstances.

Second, even if the Camara line of cases did apply here, the search in this case does not satisfy even the standards applicable to "regulatory" searches. Contrary to the State's apparent belief, those cases do not establish an open-ended exception to ordinary Fourth Amendment principles. Though the decisions may appear to follow a wavering line, all of them insist on substantive safeguards and procedural regularity sufficient to make the administrative program "reasonable" -- safeguards entirely lacking under the New York statutes here.

1. The search of Mr. Burger's premises was not an "administrative inspection" within the meaning of this Court's cases.

a. This Court's prior cases have consistently distinguished administrative inspections from searches designed to enforce the criminal laws.

Every one of the cases in which this Court has tolerated searches of private premises on less than conventional probable cause under the rubric of "administrative inspections" has involved a limited inspection to insure compliance with an elaborate regulatory scheme affecting the public health or safety. In none has the Court accepted a claim that an ordinary police search for evidence of criminal violations entirely unrelated to any system of regulation could be justified by a state statute purporting to permit routine searches for such evidence, in the absence of either a warrant or probable

cause.

In Camara v. Municipal Court, supra, the first of this line of cases, this Court rejected warrantless searches of private premises by building inspectors to determine a building's compliance with municipal building or housing codes. The Court held, however, that a warrant could issue to permit such inspections even in the absence of probable cause to believe that a violation would be found in a particular building.*

In accepting this weakening of the ordinary probable cause standard, the Court expressly distinguished building inspections from searches conducted in the course of a

* In the companion case of See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the same rule to commercial buildings that it had applied to residential property in Camara.

criminal investigation. Citing the specific example of searches for stolen goods, the Court emphasized that the

> public interest [in recovering stolen goods] would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

387 U.S. at 535.

Since the decision in Camara, this Court has faced numerous similar cases in which state or federal officials sought to engage in searches of private premises, pursuant to some sort of regulatory program, on less than a regular search warrant supported by probable cause. In some of these cases, the Court has required that at least the limited search

warrant specified in Camara be obtained.* In others, the Court has weakened constitutional protections still further, permitting limited administrative inspections without any prior neutral scrutiny at all.**

Whether or not an "administrative" warrant is required in these cases has often deeply divided the Court, and the distinctions between the cases in which warrants have and have not been held necessary are not always clear. But whatever division or confusion may exist about these cases should not obscure one fundamental feature that unites all of the

---

* In addition to Camara, see See v. City of Seattle, 387 U.S. 541 (1967); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); Michigan v. Clifford, 464 U.S. 287 (1984).

** See United States v. Biswell, 406 U.S. 311 (1972); Donovan v. Dewey, 452 U.S. 594 (1981). See also Colonnade Corp. v. United States, 397 U.S. 72 (1970).

cases in the Camara line: Each and every case in which the Court has approved a search of private property without the full range of safeguards normally demanded by the Fourth Amendment has involved limited inspections to determine and enforce compliance with particular regulations imposed under a comprehensive administrative scheme created to further pressing health and safety concerns. Where the principle objective of the search is to uncover evidence of criminal acts unrelated to such a regulatory scheme, this Court has never permitted any weakening whatever of the Fourth Amendment's requirements. Such searches may be conducted only pursuant to an ordinary search warrant, supported by probable cause.

Simply put, the "administrative search" rationale that has been held to permit

searches without particularized probable cause or, in some cases, even without a warrant, only applies to searches necessary to further genuine administrative regimes, and not to governmental attempts to enforce ordinary criminal laws by providing for routine, randomly-conducted searches for evidence of criminal violations in connection with an otherwise pro forma licensing requirement.

This critical distinction is not only implicit in the facts of the cases in which searches without probable-cause-based warrants have been permitted. It has been explicitly emphasized in both majority and dissenting opinions throughout the Camara line of cases. For example, in its most recent encounter with the administrative search doctrine, the Court rejected a claim that arson investigators should be permitted to make warrantless

searches to determine the origins or causes of fires. Michigan v. Clifford, 464 U.S. 287 (1984). The Court concluded that in the absence of exigent circumstances, a warrant of some sort was required. As to the nature of the warrant required, Justice Powell's plurality opinion sharply distinguished between administrative and criminal investigations:

> If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. To obtain such a warrant, fire officials need only show that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.
>
> If the primary object of the search is to gather evidence of criminal activity, a search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in

> the place to be searched. ... A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause.

Id. at 294-95 (emphasis added; footnotes omitted).*

This recognition was hardly a novelty in Clifford. From the very outset of the administrative search line of cases, the Court distinguished the limited Fourth Amendment protection available in the administrative cases from the traditional requirement of a warrant supported by probable cause to authorize a search for evidence of crime. As

---

* See also Michigan v. Tyler, 436 U.S. 499, 511-12 (1978) (warrantless entry of firefighters to put out fire justified by exigency; additional entries to determine cause of fire require administrative warrants; but if evidence of crime is sought officials "may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime").

we have seen, Justice White's opinion for the Court in Camara emphasized that countenancing weakened warrants in administrative cases did not "endanger[] time-honored doctrines applicable to criminal investigations." 387 U.S. at 539. The dissenters, who would have permitted warrantless housing code inspections, similarly emphasized that the warrantless inspections they would permit "under the carefully circumscribed requirements of health and safety codes" were not "designed as a basis for criminal prosecution." See v. City of Seattle, 387 U.S. at 548-49 (Clark, J., dissenting).

The same distinction was made in Donovan v. Dewey, 452 U.S. 594 (1981). In Dewey, the Court permitted warrantless administrative searches to determine compliance with the regulatory regime of the Mine Safety Act.

Even as it held that warrantless administrative searches of commercial property are in some circumstances reasonable under the Fourth Amendment, however, the Court was careful to point out that an ordinary warrant supported by probable cause is required "when commercial property is searched for contraband or evidence of crime." Id. at 598 n. 6. Similarly, while joining in the Court's approval of the warrantless searches in Dewey, then-Justice Rehnquist was careful to emphasize that the same result could not be expected if a legislature sought to authorize warrantless "administrative" searches for criminal evidence:

> I have no doubt that had Congress enacted a criminal statute similar to that involved here -- authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity -- the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would

> invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime ... .

452 U.S. at 608.

b. The distinction between administrative and criminal searches is fundamental to a proper understanding of the Fourth Amendment.

The Court's powerful and continued insistence that the "administrative" search be confined to its proper sphere reflects a compelling insight about the purpose of the Fourth Amendment. The vital protection of a person's privacy in his home or property must of course yield to a sufficient showing that evidence of crime is to be found on particular premises. The Fourth Amendment provides for this compelling law enforcement necessity, but carefully specifies the standards and procedures by which a showing of necessity is

to be made: Except in exigent circumstances, a prior determination by a detached judicial officer of the existence of probable cause is required for a search to be reasonable. This procedure was specifically intended to strike the necessary balance between personal privacy and criminal law enforcement; it already incorporates, and thus is not superseded by, a proper appreciation of the necessities of law enforcement.

The administrative search cases do not affect this balance. The administrative schemes at issue in those cases do not propose new ways in which the police can search for evidence of crimes outside the balance struck by traditional Fourth Amendment jurisprudence. Searches of homes and businesses were not permitted in Camara and See to allow the police to enter premises to look for evidence

of narcotics use or burglary; gun dealers were not subjected to "administrative inspection" in Biswell so that the police could look for weapons that were used in crimes.

In each case, rather, the searches or inspections were geared to the particular needs of enforcing regulatory regimes necessitated not by the eternal problem of criminal law enforcement, but by the unique economic and social conditions of the modern state. Thus, fire, housing and occupational safety codes are required by modern urban and technological conditions, and regular inspections are necessary to enforce compliance with those codes; the distribution of dangerous substances like guns and liquor require regulation, and regular inspection to determine compliance follows.

These searches "represent responses to relatively unique circumstances." Marshall v. Barlow's, Inc., 436 U.S. at 313. In such circumstances, constitutional protections crafted for police searches are made less necessary by several factors, including (1) the lessened expectation of privacy resulting from participation in a pervasively regulated business; (2) the limited intrusion into privacy required by an inspection undertaken for a limited purpose; and (3) the presence of administrative structures that assure that inspections are made in a regular and fair manner, and not in a random or discriminatory fashion, thus lessening the need for an ordinary warrant. See Donovan v. Dewey, 452 U.S. at 599-600.

c. The New York statutes here authorize criminal, not administrative, searches.

In this case, however, the Court faces not an administrative inspection of this type, but precisely the kind of search for criminal evidence for which the ordinary Fourth Amendment rules were specifically created, and which Chief Justice Rehnquist in Dewey was so certain would be invalidated. For what New York has done is precisely to authorize "unannounced, warrantless searches" of a class of property its legislature reasonably believed would frequently "house unlawful ... activity" -- the possession of stolen property. The effort to disguise the statute in the trappings of an "administrative scheme" cannot affect this conclusion.

The New York Court of Appeals, which is

in a better position than this Court to interpret the meaning and purpose of New York statutes, correctly recognized that the New York statutes at issue in this case are intended to facilitate enforcement of criminal law and not to ensure compliance with any administrative regulation. As that court pointed out, far from being comprehensive regulatory schemes, "New York City Charter §436 and Vehicle and Traffic Law §415-a do little more than authorize general searches, including those conducted by the police, of certain commercial properties." 67 N.Y.2d at 344.

The New York Court was clearly correct in this conclusion. New York City Charter §436, as the court below pointed out, may be set aside at once: It imposes no licensing or regulatory requirements whatever on the

businesses subject to it, but merely announces a power in the police to subject those businesses to inspection at the whim of the authorities. Id. While Vehicle and Traffic Law §415-a "does contain some suggestion of an administrative scheme by imposing licensing and record-keeping requirements," id., these requirements hardly constitute a detailed scheme of regulation requiring the sort of search to which Mr. Burger's premises were subjected.

The "licensing" requirements referred to by the court are more a formality than a serious regulatory effort. Unlike other businesses requiring a license,* virtually no

---

* New York imposes specific licensing requirements on dozens of trades and businesses. The requirements for such licenses are generally far more detailed and specific than those established by §415-a for vehicle dismantlers. See, e.g., N.Y. Educ. L. §§7804-06 (masseurs); 3228 (newspaper carriers).

substantive qualifications are required of one who wishes to operate as a "vehicle dismantler." Anyone who wishes to set up such a business may do so upon payment of a $50 fee, provided only that the business complies with local zoning laws and its operator is determined by the Motor Vehicles Commissioner -- in accordance with no articulated standard -- to be a "fit person[]". N.Y. Vehicle and Traffic Law §415-a(3), (4). Indeed, the statute itself does not even speak of "licensing," with its connotations of standards and qualifications, aptly preferring the more ministerial term "registration." Id. §415-a.

The "regulatory scheme" imposed on those who have established such businesses is no more elaborate, and provides no greater justification for sweeping powers of

inspection, than the registration requirements. No limitation or regulation is made regarding the nature of a vehicle dismantler's premises, the method of its operation, the hours it may be open for business, or the functions it may perform. The sole operating requirement imposed by the statute is that a business subject to its requirements must keep a record of all motor vehicles or motor vehicle parts acquired, and the disposition of such parts. Id. §415-a(5)(a). It is these records, and the vehicles or parts that are the subject of such records, that the statute requires to be made available for inspection. Id.

The pallid quality of these regulations is important for several reasons. First, it refutes New York's contention that vehicle dismantling or junkyard operation is so

"pervasively regulated" as to diminish the reasonable expectation of privacy of anyone engaged in that business to the point that normal Fourth Amendment protections disappear. (P. Br. 13-18). Unlike such businesses as the sale of liquor, dealing in weapons, or mining, each of which is subject to extensive regulations and licensing requirements controlled by specialized administrative agencies, cf. Colonnade, Biswell and Dewey, the New York administrative scheme consists solely of the minimal registration and record-keeping requirements noted above.* The only aspect of this regulatory regime that significantly affects the privacy expectations of those engaged in this business is the challenged provision for warrantless searches

---

* The various statutes and regulations cited at footnote 4 of the State's brief add little or nothing to the basic scheme established by §415-a.

itself.* One has only to compare the minimalist regulatory framework of the instant statutory scheme to the pages and pages of statutes and regulations of the Mine Safety Act, see 30 U.S.C. §§801-962; 30 CFR §§1.1-100.8, or the extensive housing code at issue in Camara, to understand the weakness of New York's claim that vehicle dismantlers are "pervasively" regulated, or lack ordinary expectations of privacy because of the handful of record-keeping regulations imposed on them.

Second, the contrast between the limited nature of the regulatory scheme and the

---

* New York's suggestion that the New York Court of Appeals regarded the state's regulatory regime as "sufficiently pervasive to allow a scheme of warrantless inspections" (P.Br. 17) is hardly supported by the court's opinion. Far from characterizing the regulations as "pervasive," the court noted that the state statute and city charter "do little more than authorize general searches ... of certain commercial premises." 67 N.Y.2d at 344.

sweeping search undertaken in this case defeats any argument that the searches authorized by the statute are required in order to enforce the administrative scheme. The substantive regulations imposed by §415-a required Mr. Burger only to register and to maintain certain records. He conceded when the police arrived that he had not registered for a license and did not maintain any records. At that point, any further search could not be justified by a purported need to enforce the administrative scheme: A further search could reveal nothing more about Mr. Burger's failure to comply with the regulations. To the extent that §415-a authorized a search at that point, the search was obviously of a criminal rather than administrative nature. This Court would surely not have approved legislation that permitted the officers in Biswell, having

determined that the defendant was not in compliance with the gun control regulations, to search the rest of his property for evidence of further crimes unrelated to the regulated business. But that is precisely what the officers here did to Mr. Burger.* As evidenced all too well by this case, the search permitted by this statute is not a limited-purpose inspection of particular records, functions or inventory, but a total search of the entire premises and all items found there.

---

* New York argues that acceptance of this argument would permit a junk dealer to "thwart" the administrative scheme by failing to keep records. (P. Br. 31). But this argument depends on precisely the confusion of administrative and criminal ends that pervades the New York statute. A businessman who fails to register or keep records does not "thwart" the scheme. He violates it, and is subject both to administrative sanctions and to criminal penalties. Neither does he "thwart" the State's ability to gather evidence for a criminal prosecution. All that is thwarted is the State's desire to seek evidence of ordinary crimes without probable cause or a warrant.

Third, an elaborate administrative machinery evidences the genuineness of the need for regulation claimed to justify invasions of privacy on less than probable cause. For instance, the extensiveness of the congressional concern with mine safety is demonstrated by the comprehensive statute regulating the issue, and the detailed regulations that implement it; such regulation evinces a genuine determination to address a unique regulatory problem. The casualness of the regulatory program adopted by New York, and its enforcement by ordinary police officers, demonstrate in contrast the absence of a genuine concern for business regulation.

Indeed, the State's own characterization of its purposes concedes that the searches undertaken pursuant to the challenged statutes

do not serve any purpose connected to controlling the operation of junkyards, but rather are intended to enforce the generally-applicable criminal laws against possession of stolen property. (P. Br. 18). In stark contrast to the regulatory programs at issue in the Camara line of cases, the state has created no regulations specifically governing the proper operation of the affected business, and searches under the challenged statutes are not designed to determine compliance with any such business regulations. Rather, because of a perceived risk that some of those engaged in a particular business are violating general criminal statutes, the State required that everyone in that business demonstrate on demand of the police that they are not committing crimes, and that they surrender their constitutionally-protected expectations of privacy.

The effect of the New York statute is to reverse the usual constitutional presumption that personal privacy and property rights may not be violated in a criminal investigation until the state demonstrates evidence of criminal activity. Instead, the New York scheme singles out a class of businesses for a presumption that those engaged in it are predisposed to criminal activity, and are therefore required to open their property to random police inspections in order to prove their innocence.

To uphold the warrantless search here would create a potential for evasion of the Constitution not present in the Court's previous administrative search cases. States could destroy the Fourth Amendment protection of any class of business simply by finding a

propensity for certain criminal acts on the part of some proprietors of such businesses, requiring that such businesses obtain a pro forma license, and then authorizing regular "inspections" to make sure that no crimes were being committed. Tobacconists could be randomly raided for marijuana or other illegal drugs; booksellers' warehouses could be checked for pornography; news dealers or other small shopkeepers could be "inspected" for evidence of bookmaking -- all on the basis of "regulatory" schemes designed, like the one at issue here, simply to forestall criminal activity sometimes carried out under cover of those businesses.*

* The limits of the rationale suggested by the State are difficult to discern. Since the objects of "inspection" could be hidden anywhere on the premises, and since any evidence found in "plain view" during the search can be seized, the extent of the intrusion into privacy is not meaningfully limited by the purpose assigned by the legislature. Moreover, since the

In short, the "administrative" search purportedly authorized by the New York statute serves no valid regulatory purpose. Its conceded object, rather, is to facilitate police searches for stolen property and criminal prosecutions for its possession, by subjecting to warrantless searches classes of businesses believed by the legislature to have a propensity to involvement in such offenses. The New York statute is not an example of the administrative necessities that have led this Court to recognize a limited exception to the usual rules of search and seizure, but an effort to take advantage of that exception to cloak a statute that attempts to dispense with the Amendment's requirements. As the Chief

"administrative inspection" rationale is not limited to commercial premises, Camara v. Municipal Court, supra, it is not clear that homes too could not be subjected to such unlimited "regulatory" searches.

Justice predicted in Donovan v. Dewey, 452 U.S. at 608, there should be "no doubt" that such a statute should be held invalid under the Fourth Amendment.

2. Even if the search in this case were properly treated as an "administrative inspection," the Fourth Amendment requires at least that an administrative search warrant be obtained before an intrusion into private premises was made.

Even if the statutory searches of junk dealers and vehicle dismantlers could properly be characterized as administrative searches, that would neither end the inquiry nor compel the conclusion that the statute satisfies the Fourth Amendment. As this Court has repeatedly held, even administrative searches ordinarily require a warrant, although a warrant of a special, limited sort. Michigan v. Clifford, supra; Marshall v. Barlow's, Inc., supra; Camara v. Municipal Court, supra.

In searches undertaken under regulatory schemes, no less than in searches for evidence of crimes,

> the incremental protections afforded the [citizen's] privacy by a warrant ... justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.

Marshall v. Barlow's, Inc., 436 U.S. at 323-24.

These reasons apply with even greater

than usual force to this case. Particularly where an "administrative" search is conducted by ordinary police officers under a statutory scheme that is, to say the least, closely associated with ordinary law enforcement goals, there is a strong likelihood that searches will not be made "pursuant to an administrative plan containing specific neutral criteria," but will be undertaken instead as a pretext to evade the Fourth Amendment's warrant requirements in ordinary criminal investigations.*

Indeed, the only exception to the search warrant requirement has been in the case of "pervasively regulated business[es]," United States v. Biswell, 406 U.S. at 316, in which

* Indeed, as the court below pointed out, the New York courts have confronted exactly this problem. 67 N.Y.2d at 342-43. See People v. Pace, 101 A.D.2d 336 (2d Dep't 1984), aff'd, 65 N.Y.2d 684 (1985).

any entrepreneur "has voluntarily chosen to subject himself to a full arsenal of government regulation." Marshall v. Barlow's, Inc., 436 U.S. at 313. "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id.

As demonstrated above, it cannot seriously be maintained that vehicle dismantling is such an industry. Rather than a "full arsenal of governmental regulation," New York has subjected this business only to a single rifle shot aimed directly at the Fourth Amendment.

Even where the regulatory presence is sufficiently longstanding and detailed to meet

this requirement, moreover, this Court's recent cases have insisted that a warrantless inspection may only be sustained where the regulatory regime provides a reasonable substitute for a warrant's protection of privacy, by establishing reasonable substantive standards for determining when searches will be undertaken and procedural mechanisms to challenge their validity.

Thus, in Donovan v. Dewey, supra, even after establishing that federal regulation of mining was indeed pervasive, and that the program of safety inspections was vital to enforcement of that regulatory scheme, the Court noted that the "real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." 452 U.S.

at 603.

The Mine Safety Act met both the substantive and procedural aspects of this requirement. The Act avoided administrative arbitrariness in selecting targets of searches by "requir[ing] inspection of all mines and specifically defin[ing] the frequency of inspection." Id. at 603-04. And the Act provided a mechanism for protection of privacy, by "prohibit[ing] forcible entries," and requiring a civil action to enjoin a mine owner who refused inspection. "This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have." Id. at 604-05. In effect, the Act did require prior

judicial approval of any forcible entry, in a manner that provided greater protection than an ex parte warrant application.

The New York statutes, of course, are not remotely comparable to the Mine Safety Act in this regard. Neither the statutes nor any public regulations contain standards of any kind for the selection of targets of searches; so far as this record shows, searches are made entirely on the unbridled discretion of police officers that concerned this Court in Barlow's. And there is no mechanism for challenging the validity of a search in advance; as this case shows, the authorized response where permission to search is refused is search by the forcible compulsion of armed police officers: precisely the sort of "abrupt and peremptory confrontation between sovereign and citizen" that "the Fourth Amendment

neither requires nor sanctions." Michigan v. Tyler, 436 U.S. at 513-514 (Stevens, J., concurring in part and concurring in the judgment).

CONCLUSION

The searches purportedly authorized by the challenged New York statute, such as the one made in this case, are not administrative or regulatory searches at all. They are ordinary searches to obtain evidence of criminal violations, and as such, are subject to the Fourth Amendment's requirement of a warrant supported by probable cause. Even if viewed as administrative inspections, moreover, such searches require at least an administrative warrant demonstrating the reasonableness of the search according to neutral regulatory criteria. In either case, New York's own highest court correctly determined that the warrantless search in this case violated the Fourth Amendment, and its judgment should be affirmed.

Respectfully submitted,

GERARD E. LYNCH
Counsel of Record
435 West 116th Street
New York, New York 10027
(212) 280-8232

ALVIN J. BRONSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

RICHARD EMERY
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorneys for Amicus Curiae

Counsel gratefully acknowledge the assistance of Eric B. Schnurer (application to bar pending) in the preparation of this brief.

January 21, 1987

APPENDIX A

Statutory Provisions Involved

New York Vehicle and Traffic Law § 415-a:

Vehicle dismantlers and other persons engaged in the transfer or disposal of junk and salvage vehicles

1. Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this

vehicle collector unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class A misdemeanor.

2. Application for registration. An application for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be made to the commissioner on a for prescribed by him which shall contain the name and address of the applicant and the names and addresses of all persons having a financial interest in the business. Such application shall contain a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a listing of all arrests for any such violations by the applicant and

any other person required to be named in such application. The application shall also contain the business address of the applicant and may contain any other information required by the commissioner.

3. Fees. The annual fee for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be fifty dollars. Upon approval of an application, an appropriate registration shall be issued for a period of time determined by the commissioner and if issued for a period of more or less than one year, the fee shall be prorated on a monthly basis.

4. Requirements for registration. (a) Except as otherwise provided herein, no registration shall be issued or renewed unless the applicant has a permanent place of

business at which the activity requiring registration is performed which conforms to section one hundred thirty-six of the general municipal law as such section applies and to all local laws or ordinances and the applicant and all persons having a financial interest in the business have been determined by the commissioner to be fit persons to engage in such business. However, the commissioner may issue a temporary registration pending final investigation of an application.

(b) The provisions of this subdivision requiring a place of business at which the activity requiring registration is performed shall not apply to a mobile car crusher nor to an itinerant vehicle collector. However, the mobile car crusher or itinerant vehicle collector must otherwise comply with all applicable local licensing laws or ordinances.

(c) Notwithstanding the provisions of paragraph (a) of this subdivision, the commissioner may issue a registration to an applicant for registration as a vehicle dismantler or salvage pool to a person who may not comply with local laws relating to zoning provided that the applicant has engaged in business at that location as a vehicle dismantler since September first, nineteen hundred seventy-three. However, the issuance of such registration shall not be a defense with respect to any action brought with respect to violation of any such local law.

5. Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner or which would be eligible

to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer

and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. Upon request of any agent of the commissioner and during his regular and usual business hours, a salvage pool, mobile car crusher or itinerant vehicle collector shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as

required by this paragraph shall be a class A misdemeanor.

(b) Every vehicle dismantler and salvage pool shall display at his place of business at least one sign upon which his registration number and any other information required by the commissioner is affixed in a manner prescribed by the commissioner and further shall affix his registration number on all advertising, business cards, and vehicles used by him in connection with his business. The commissioner is hereby empowered to require, by regulation, that vehicle dismantlers and salvage pools mark, stamp or tag major component parts of vehicles in their possession in a manner prescribed by the commissioner so as to enable the part so marked to be identified as having come from a particular vehicle and from a particular

vehicle dismantler and salvage pool. A violation of this paragraph shall be a class A misdemeanor.

6. Suspension, revocation and refusal to renew a registration; civil penalty. (a) A registration may be suspended or revoked, or renewal of a registration refused upon a conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts, or after the registrant has had an opportunity to be heard upon any change of status of the registrant which would have resulted in refusal to issue a registration, any false statement in an application for a registration, any violation of subdivision five of this section or regulations promulgated by the commissioner with respect

to this section, or any violation of title ten of this chapter.

(b) Civil penalty. The commissioner, or any person deputized by him, in addition to or in lieu of revoking or suspending the registration of a registrant in accordance with the provisions of this article, may in any one proceeding by order require the registrant to pay to the people of this state a civil penalty in a sum not exceeding one thousand dollars for each violation and upon the failure of such registrant to pay such penalty within twenty days after the mailing of such order, postage prepaid, registered or certified, and addressed to the last known place of business of such registrant, unless such order is stayed by an order of a court of competent jurisdiction, the commissioner may revoke the registration of such registrant or

may suspend the same for such period as he may determine. Civil penalties assessed under this subdivision shall be paid to the commissioner for deposit into the state treasury, and unpaid civil penalties may be recovered by the commissioner in a civil action in the name of the commissioner.

(c) In addition, as an alternative to such civil action and provided that no proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county in which the registrant is located a final order of the commissioner containing the amount of the penalty assessed. The filing of such final order shall have the full force and effect of a judgment duly docketed in the office of such clerk and may be enforced in the same manner

and with the same effect as that provided by law in respect to executions issued against property upon judgments of a court of record.

7. Registration as a dealer and as a vehicle dismantler or salvage pool. A person may be registered as a dealer under section four hundred fifteen of this chapter as well as a vehicle dismantler or a salvage pool under this section. However, any such person must obtain a separate registration for each activity and must maintain separate records for each activity.

8. Vehicle rebuilders. (a) A vehicle rebuilder is any person engaged in the business of acquiring damaged vehicles for the purpose of repairing and reselling such vehicles. In order to engage in such business, a person must be registered as a

vehicle dismantler pursuant to this section or as a dealer pursuant to section four hundred fifteen of this chapter.

(b) A vehicle rebuilder shall maintain a record of all vehicles or major component parts thereof coming into his possession for the purpose of rebuilding and all major component parts used in connection with such rebuilding in a manner prescribed by the commissioner. Upon request of an agent of the commissioner or any police officer during his regular and usual business hours, a vehicle rebuilder shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such records or to permit

such inspection as required by this paragraph shall be a class A misdemeanor.

9. Scrap processor. (a) A scrap processor is any person required to be licensed under article six-C of the general business law who purchases material which is or may have been a vehicle or vehicle part for processing into a form other than a vehicle or vehicle part, but who, except as otherwise provided by regulation of the commissioner, does not sell any such material as a motor vehicle, a trailer or a major component part thereof. No person shall engage in business or operate as a scrap processor as defined in this paragraph unless he has given notice to the commissioner that he is a scrap processor and that he has complied with article six-C of the general business law, and he has been certified by the commissioner as a scrap processor. A

violation of this paragraph shall be a class A misdemeanor.

(b) A scrap processor shall maintain a record of vehicles and a major component parts by weight coming into his possession thereof in a manner prescribed by the commissioner. This paragraph shall not apply to any major component part included in a mixed load. Upon request of an agent of the commissioner or any police officer or during his regular and usual business hours, a scrap processor shall produce such records and permit such agent or police officer to inspect them and to inspect any vehicles or major component parts of vehicles at the time of the delivery of such vehicles or parts to him. The failure to produce such records or to permit such inspection as required by this paragraph shall be a class A misdemeanor.

10. Scrap collectors and repair shops. (a) A scrap collector is any person, other than a governmental agency, whose primary business is the collection of miscellaneous scrap for disposal, who may as an incident of such business collect vehicular parts as scrap. No person shall engage in the business or operate as a scrap collector as defined in this paragraph unless he has given notice to the commissioner that he is a scrap collector and has been certified as a scrap collector by the commissioner. A violation of this provision shall be a class A misdemeanor. No person shall be certified as a scrap collector eligible to do business within a city having a population of one million or more, or any county contiguous to such city, unless such person complies with all local requirements applicable to such business.

(b) If required by regulation of the commissioner, a scrap collector shall keep records of his acquisition and disposition of vehicular scrap in a manner prescribed by the commissioner. Upon request of an agent of the commissioner or any police officer, a scrap collector shall produce such records as may be required to be kept and permit said agent or police officer to inspect them during usual business hours or while business is being conducted. The failure to produce such records as required by this paragraph shall be a class A misdemeanor.

(c) A repair shop registered pursuant to article twelve-A of this chapter which disposes of vehicular scrap to a certified scrap processor shall apply to the commissioner for certification to carry out

this disposal. The repair shop shall include in the application for certification the names and addresses of those scrap processors with whom it arranges for the disposal of its scrap. Thereafter the repair shop shall give notice to the commissioner within thirty days of any change in the scrap processors with whom it deals. The failure to comply with this paragraph or to make fraudulent statements regarding the scrap processors with which a repair shop arranges for the disposal of vehicular scrap shall be a class A misdemeanor.

11. Out-of-state businesses. A person doing business in this state who does not have a place of business in this state, but has a place of business or engages in such business in another state or province or Canada and who would be required to be registered or

certified pursuant to this section if it were in this state, shall apply to the commissioner for an identification number in a manner prescribed by the commissioner. Such identification number shall be issued provided that such person complies with all the laws and regulations of the jurisdiction in which he has his principal place of business or engages in such business applicable to such business.

12. Identification of certified persons. (a) Every person who is certified or who has been issued an identification number by the commissioner shall display such certification or identification number upon any vehicle used by him for the business of transporting vehicles or parts of vehicles, in accordance with regulations prescribed by the commissioner.

(b) It shall be a class A misdemeanor for any person required to be registered or certified pursuant to the provisions of this section to transport a vehicle or major component parts out of New York state without having and displaying his registration or certification number as provided for in this section.

13. Suspension or revocation of identification number or certification. An identification number and/or certification issued pursuant to subdivision eight, nine, ten or eleven of this section may be suspended or revoked upon conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts. The commissioner may also revoke or

suspend registration or certification, after an appropriate hearing where the holder of the registration or certification has had an opportunity to be heard, upon a finding of: (a) that there has been a change to the holder's status which would have resulted in refusal to issue in the first instance, or (b) that the issuance was based upon a false statement by the holder, or (c) that there was a violation of the record keeping requirements, or (d) that there was a violation of the regulations promulgated by the commissioner pursuant to this section, or (e) that there was a violation of title X of this chapter.

14. Restrictions on scrap processors. A certified scrap processor shall not purchase any material which may have been a vehicle or a major component part of a vehicle, if

recognizable as such, from any person other than a dealer registered pursuant to section four hundred fifteen of this chapter, an insurance company, a governmental agency, a person in whose name a certificate of title or other ownership document has been issued for such vehicle or a person registered or certified or issued an identification number pursuant to this section. A violation of this subdivision shall be a class A misdemeanor.

15. Regulations. The commissioner shall prescribe such rules and regulations as he shall deem necessary to carry out the provisions of this section.

New York City Charter § 436:

The commissioner shall possess powers of general supervision and inspection over all

licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by the judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both.